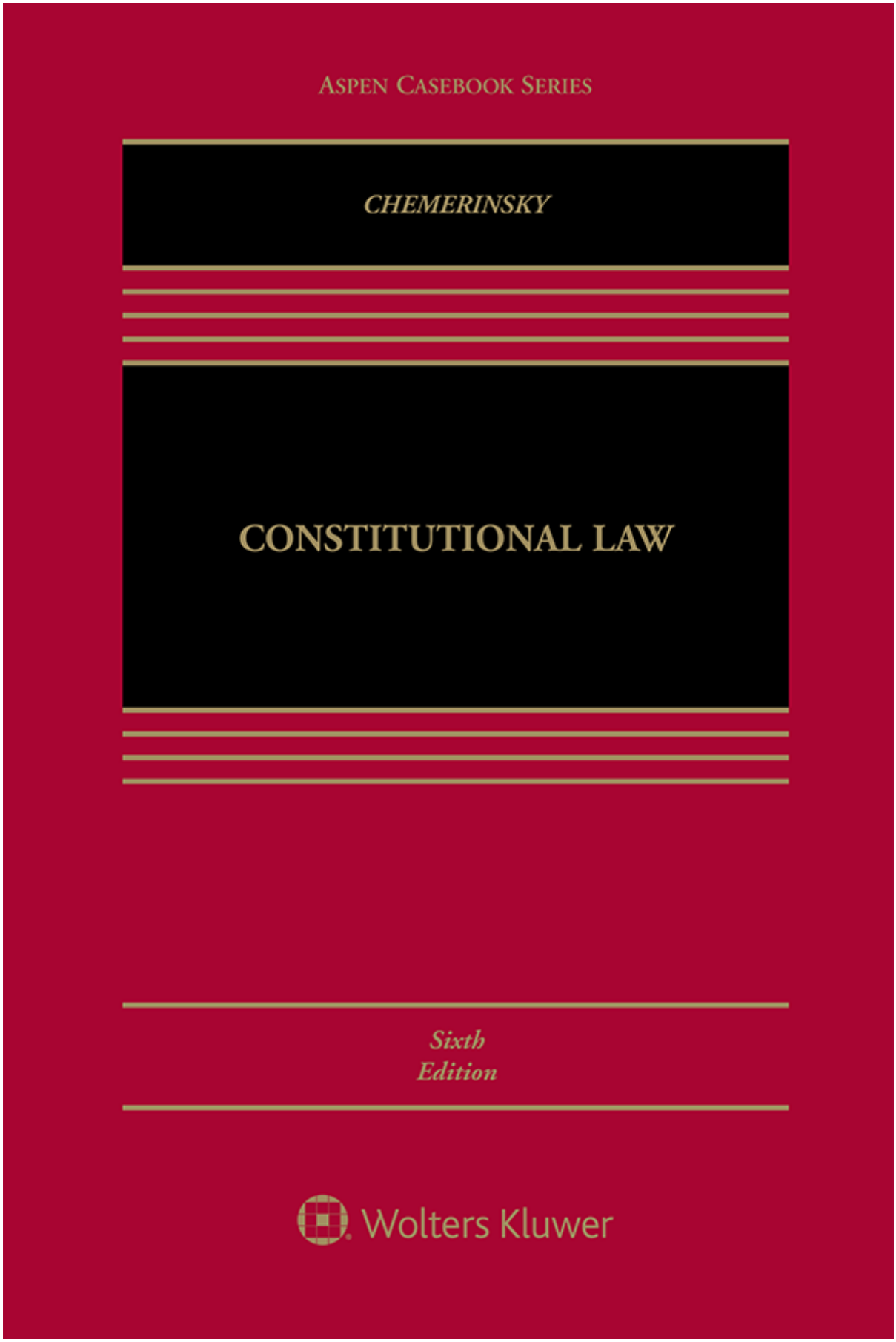

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Constitutional Law

Sixth Edition

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Dedication

This book is dedicated to my students—
past, present, and future.

Contents

Preface

This book is dedicated to my students and is a product of having listened to their views about constitutional law casebooks over the past 40 years. Although I have used several different books, my students always have voiced the desire for a more straightforward, student-friendly text.

Concerns that my students have raised have influenced every aspect of this book. They have expressed a desire for a book that does not pose countless rhetorical questions, leaving them uncertain about what to focus on in their studying. This book assumes that each teacher will ask the questions that are of greatest interest to him or her. (An accompanying teacher's manual offers suggestions, based on the questions that I focus on in teaching the cases.)

My students also have communicated experiencing difficulty with passages from excerpted law review articles. They have indicated that often the excerpts are so brief and so removed from the context of the original article that they are difficult to understand. They also have expressed the desire for a book that provides more context for understanding the cases.

This book attempts to address these concerns by presenting, almost without exception, just three types of material: major cases, secondary cases that are more heavily edited, and author-written essays. My essays are meant to provide a context for the cases, to provide historical background, to describe the development of the law in areas where the cases are not directly presented, and to summarize scholarly debates on various topics. Throughout the book, my goal is to provide students the material I would want them to read before class on a particular topic. Unlike virtually every other constitutional law casebook, there are no numbered notes following cases.

I am not attempting to provide a reference book that is comprehensive in presenting every related case or citations to every major law review article. Instead, my hope is to provide a casebook that gives students the basic material to study and understand constitutional law. Professors desiring to expose their students to the rich scholarly literature on the topic may supplement this book with one of the many excellent constitutional law readers that are available.

The book follows a simple, fairly traditional organization. I realize, however, that every teacher has a preferred structure for the course. I never have followed the organization of any casebook that I have used. Also, I know that the structure and organization of constitutional law courses vary widely across the country. Therefore, I have written this book so that it will be easy for teachers to use in any order. Except for references to make clear where particular topics are covered, I have tried to avoid referring to material in other chapters in a way that assumes students have read the book in order.

The book is organized in ten chapters. Chapter 1 focuses on the federal judicial power. After presenting the cases on the authority for judicial review, Chapter 1 focuses on the method of constitutional interpretation, congressional control over Supreme Court jurisdiction, and the justiciability doctrines as constraints on the judicial power. Apart from the justiciability doctrines, other constitutional and prudential limits on the federal judicial power, such as the abstention doctrines, are omitted because they usually are covered in federal courts courses rather than in constitutional law. The one exception to this is that Chapter 2, which discusses congressional power, includes a subsection on Congress's

ability to authorize suits against state governments. This includes discussion of the Eleventh Amendment and recent sovereign immunity cases.

Chapter 2 focuses on the federal legislative power, particularly in relation to the scope of Congress's power and the extent to which concern for state sovereignty should limit such power. The chapter begins by considering McCulloch v. Maryland and then examines, in detail, several specific congressional powers: the Commerce Clause, the spending power, §5 of the Fourteenth Amendment, and the authority to authorize suits against state governments. In each area, the focus is on the breadth of congressional authority and the extent to which concern for states should cause it to be interpreted narrowly or should restrict it through the Tenth Amendment.

Chapter 3 examines the federal executive power, particularly in relation to executive-legislative conflicts. Thus, as a matter of organization, the focus of Chapter 2 is Congress's power relative to state authority, and the focus of Chapter 3 is issues arising in conflicts between Congress and the executive branch. The chapter begins by considering whether the president may exercise inherent authority and its application to the area of executive privilege. Next, the chapter looks at the constitutional problems of administrative agencies, including the nondelegation doctrine; the legislative veto; and other ways of holding agencies accountable, such as the appointment and removal powers. The chapter then considers the president's powers in foreign affairs and in the war on terror. I have added a new section on presidential power as to matters of immigration. Finally, the chapter considers ways of holding the executive accountable, such as through civil suits or impeachment.

Chapter 4 focuses on federalism as a limit on state and local power. The chapter begins by examining the issue of preemption and then considers the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. The chapter concludes with a short discussion of state taxation of interstate commerce.

Chapter 5 is titled “The Structure of the Constitution's Protection of Civil Rights and Civil Liberties.” It attempts to present material concerning every part of the Constitution dealing with individual liberties and civil rights. Specifically, the central theme of the chapter concerns to whom the Constitution applies. The chapter examines the application of the Bill of Rights to the states (incorporation) and the application of the Constitution's protections to private actors (the state action doctrine).

Chapter 6 looks at the Constitution's protection of economic liberties. Freedom of contract under the Due Process Clause; the Contracts Clause of Article I, §10; and the Takings Clause are all considered. I have chosen this approach for many reasons. The various doctrines concerning economic liberties are best understood, of course, when studied together, but it is useful for students to see how the Supreme Court treated economic rights over the course of the twentieth century and to contrast this treatment with its protection of other individual rights in the same period.

Chapter 7 looks at equal protection. After an introduction to the concept of equal protection, the chapter presents the material on rational basis review and then considers discrimination based on race and national origin, gender, alienage, parents' marital status, age, disability, wealth, and sexual orientation.

Chapter 8 examines the Constitution's protection of individual rights, other than the First Amendment. The chapter presents the law concerning rights of privacy and personhood, the right to travel, the right to vote, and the right of access to the courts. The chapter concludes by examining procedural due process rights. The chapter thus covers individual rights protected under each of the clauses of the Fourteenth Amendment: the Due

Process, Equal Protection, and Privileges or Immunities Clauses. Although the chapter is clear about where each right was found and is protected, its unifying theme is its focus on the rights possessed by individuals.

Chapter 9 focuses on the First Amendment's protection of freedom of expression. This is the longest chapter of the book, and I recognize that courses vary in how they cover this topic. Some schools, such as my own, have an entire course devoted to the First Amendment's protection of speech and religion. For such courses, I have been fairly comprehensive in covering these topics, so that the book has enough material in these two chapters to be used for an entire course. However, I also recognize that some constitutional law courses cover the First Amendment as a smaller part of a broader survey course. I therefore tried to be careful to construct the chapter so that it could be used in whole or in part, in any order, and still be comprehensible.

The chapter begins by considering the Court's method in examining freedom of speech, exploring topics such as the distinctions between content-based and content-neutral government regulation, prior restraints, vagueness and overbreadth, what is “speech,” and what is an infringement of speech. The chapter then considers the categories of unprotected and less-protected speech, such as incitement, sexual speech, commercial speech, defamation, and so on. Next the chapter examines the availability of property for speech and concludes by considering, in turn, freedom of association and freedom of the press.

Finally, Chapter 10 looks at the Religion Clauses: the Free Exercise Clause and the Establishment Clause. Again, the goal is to provide sufficient material to allow use of the book in a course specializing in the First Amendment or to allow excerption for a constitutional law survey course.

In the years since the fifth edition, there have been major decisions in virtually every area of constitutional law, including the political question doctrine, congressional power, presidential power, the dormant commerce clause, due process and equal protection, and First Amendment issues concerning speech and religion. There is substantial coverage of all of these new developments. One disquieting trend has been the significant increase in the length of Supreme Court opinions. I have erred on the side of completeness to give students a full sense of the arguments on both sides. But I also felt that the book simply could not get any longer. Thus, in some areas I have substituted essays for older or less important cases. I have deleted the materials on congressional power to authorize suits against state governments, but am glad to provide it electronically to any professor who wishes to cover this material.

Two other prefatory comments are necessary. When I began this book, my goal was to edit the cases less than most constitutional law casebooks. Reading the original decisions convinces me that for virtually every case, important material inevitably has been excised. However, as I worked on the book, I discovered that producing a text of reasonable length necessitates far more editing than I wish were necessary. I agonized over how to cut the cases and always ended up editing far more than I wanted. For the sake of readability, I have not indicated with ellipses where I have cut. Providing ellipses does not tell the reader anything about what was omitted, and constant ellipses are distracting. However, additions to the Court's language, even of a word, are indicated in brackets. I generally omitted the Court's citations, except where they seemed important to communicate something specific about the authority relied on.

The other prefatory comment concerns the relationship of this book to my one-volume treatise, *Constitutional Law: Principles and Policies.* The books are quite different in their goals and presentation. This is a casebook designed to present the major cases of

constitutional law along with sufficient additional material to provide context and a basis for class discussions. The treatise is meant to be a reference work that summarizes the law and describes competing policy considerations.

Of course, there are places where I am saying essentially the same thing, such as in providing context and historical background. Initially, I was determined not to repeat anything I said in the treatise. This proved impossible and, I think, unnecessary. I often could not think of other ways to communicate the same material. Thus, sometimes the same language, and even the same paragraphs, appear in both books. My hope is that this will in no way diminish the usefulness of my treatise, even for students using this casebook. The books are so different in their focus and presentation that occasional overlap should not be a problem.

This sixth edition follows the same approach as the first five editions but has the benefit of many helpful comments and suggestions I received from users of the book. In some places, the cases are less edited.

This fifth edition is current through the end of the Supreme Court's October 2018 term, which ended on June 27, 2019. I will continue to prepare annual supplements and a new edition every four years. I welcome suggestions from students and teachers using this book.

Erwin Chemerinsky

October 2019

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The Constitution of the United States

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

Section 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.

Section 2. [1] 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.

[2] 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.

[3] 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.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] 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.

[2] 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.

[3] 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.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] 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.

[6] 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.

[7] 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.

Section 4. [1] 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.

[2] 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.

Section 5. [1] 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.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] 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.

[4] 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.

Section 6. [1] 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.

[2] 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 encreased 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.

Section 7. [1] 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.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the 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 prevents its Return, in which Case it shall not be a Law.

[3] 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.

Section 8. [1] 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;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] 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;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] 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;

[17] 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

[18] 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.

Section 9. [1] 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.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on articles exported from any State.

[6] 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.

[7] 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.

[8] 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.

Section 10. [1] 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.

[2] 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 its 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 be subject to the Revision and Controul of the Congress.

[3] 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

Section 1. [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:

[2] 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.

[3] 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 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. 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.

[4] 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.

[5] 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.

[6] 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.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased 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.

[8] 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.”

Section 2. [1] 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 Offenses against the United States, except in Cases of Impeachment.

[2] 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, to the Courts of Law, or in the Heads of Departments.

[3] 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.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; 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.

Section 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

Section 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.

Section 2. [1] 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.

[2] 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.

[3] 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.

Section 3. [1] 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 over Act, or on Confession in open Court.

[2] 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

Section 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.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] 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.

[3] 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.

Section 3. [1] 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.

[2] 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.

Section 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

[1] 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.

[2] 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.

[3] 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.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791]

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 [1791]

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 [1791]

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 [1791]

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 [1791]

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 [1791]

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 [1791]

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 reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

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 [1798]

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 [1804]

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.

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AMENDMENT XIII [1865]

Section 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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 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.

Section 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.

Section 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.

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Section 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 of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870]

Section 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI [1913]

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 [1913]

[1] 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.

[2] 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.

[3] 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 [1919]

Section 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.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 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 [1920]

[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 sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX [1933]

Section 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 successor shall then begin.

Section 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.

Section 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.

Section 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.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 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 [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 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.

Section 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 submissions hereof to the States by the Congress.

AMENDMENT XXII [1951]

Section 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 the Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 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 [1961]

Section 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV [1964]

Section 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 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.

Section 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.

Section 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, determined 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 [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII [1992]

Section 1. No law, varying the Compensation for the services of the Senators and Representatives, shall take effect, unless an election of Representatives shall have intervened.

Constitutional Law

CHAPTER 1

The Federal Judicial Power

Baker v. Carr
Rucho v. Common Cause
Powell v. McCormack
Goldwater v. Carter
Zivotofsky v. Clinton
Nixon v. United States

A. THE AUTHORITY FOR JUDICIAL REVIEW

In studying constitutional law, you will be reading countless Supreme Court cases deciding the constitutionality of federal, state, and local laws and executive actions. Surprisingly, the Constitution is silent as to whether the Supreme Court and other federal courts have the authority to engage in such judicial review. In England, for example, both in 1787 and today, no English court has the authority to invalidate an act of Parliament. In 1787, the framers of the United States Constitution, in Philadelphia, did not discuss whether the federal judiciary should have the power of judicial review.

The authority for judicial review was first announced by the Supreme Court in Marbury v. Madison in 1803.[1] *Marbury* establishes the authority for judicial review of both federal executive and legislative acts. The historical background of the case is important in understanding the decision that follows. In November 1800, the incumbent president, John Adams, lost in a hotly contested election. Thomas Jefferson received a majority of the popular vote but tied in the Electoral College vote with Aaron Burr. Jefferson ultimately prevailed, based on a vote in the House of Representatives.

Adams was a Federalist, and the Federalists were determined to exercise their influence before the Republican, Jefferson, took office. In January 1801, Adams's secretary of state, John Marshall, was named to serve as the third chief justice of the U.S. Supreme Court. Throughout the remainder of Adams's presidency, Marshall served as both secretary of state and chief justice.

On February 13, 1801, Congress enacted the Circuit Judge Act, which reduced the number of Supreme Court justices from six to five, decreasing the opportunity for Republican control of the Court. The Act also eliminated the Supreme Court Justices' duty to serve as circuit judges and created 16 new judgeships on the circuit courts. However, this change was short-lived; in 1802, Congress repealed this statute, restoring the practice of circuit riding by Supreme Court Justices and eliminating the newly created circuit court judgeships. The constitutionality of congressional abolition of judgeships was not tested in the courts.

On February 27, 1801, less than a week before the end of Adams's term, Congress adopted the Organic Act of the District of Columbia, which authorized the president to appoint 42 justices of the peace. Adams announced his nominations on March 2, and on March 3, the day before Jefferson's inauguration, the Senate confirmed the nominees. Immediately, Secretary of State (and Chief Justice) John Marshall signed the commissions for these individuals and dispatched his brother, James Marshall, to deliver them. A few commissions, including one for William Marbury, were not delivered before Jefferson's inauguration. President Jefferson instructed his secretary of state, James Madison, to withhold the undelivered commissions.

William Marbury filed suit in the U.S. Supreme Court seeking a writ of mandamus to compel Madison, as secretary of state, to deliver the commission. A writ of mandamus is a petition to a court asking it to order a government officer to perform a duty. Marbury claimed that the Judiciary Act of 1789 authorized the Supreme Court to grant mandamus in a proceeding filed initially in the Supreme Court. Although Marbury's petition was filed in December 1801, the Supreme Court did not hear the case until 1803 because Congress, by statute, abolished the June and December 1802 Terms of the Supreme Court.

In reading Marbury v. Madison, it will be useful to focus on the following questions: (1) How does the Court justify judicial review of executive actions, and, according to the Court, when is such judicial review available and when is it unavailable? (2) Why does the Court find the Judiciary Act of 1789 unconstitutional? (3) How does the Court justify judicial review of legislative acts?

MARBURY v. MADISON

5 U.S. (1 Cranch) 137 (1803)

Mr. Chief Justice MARSHALL delivered the opinion of the court.

The following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

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

This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission: still the commission is not necessarily the appointment; though conclusive evidence of it.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice directed by convenience, but not by law.

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

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

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

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. It behooves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

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

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

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

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act

in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

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

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

It remains to be inquired whether,

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

1. The nature of the writ applied for. And,
2. The power of this court.

1. The Nature of the Writ

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice.” These circumstances certainly concur in this case.

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

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

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

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, [mandamus is appropriate].

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

Whether it can issue from this court.

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

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

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

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

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

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

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take

appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The constitution declares that “no bill of attainder or ex post facto law shall be passed.” If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

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

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

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

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

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

NOTES ON MARBURY v. MADISON

Marbury v. Madison establishes a number of key propositions that continue to this day. First, it creates the authority for judicial review of executive actions. The Court draws a distinction between areas in which there are individual rights, and therefore government duties, and those in which the executive has discretion as to how to act. In the latter, the Court says that only the political process is the check on the executive branch.

Second, *Marbury* establishes that Article III is the ceiling of federal court jurisdiction. The precise holding is that Congress cannot expand the original jurisdiction of the Supreme Court. More generally, *Marbury* stands for the proposition that Article III authorizes the maximum jurisdiction of the federal courts. As a result, Congress cannot authorize federal courts to hear cases beyond what is specified in Article III, and federal courts cannot gain jurisdiction by consent.

Third, *Marbury* establishes the authority for judicial review of legislative acts. This, of course, is what Marbury v. Madison is most renowned for establishing. *Marbury* does this by declaring unconstitutional a provision of a federal law, the Judiciary Act of 1789, which the Court interprets as authorizing the Supreme Court to exercise mandamus on original jurisdiction. Yet a careful reading of that provision makes it questionable whether the provision authorizes this. The relevant portion of section 13 of the Judiciary Act stated:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; . . . and shall have power to issue writs of prohibition . . . to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any court appointed, or persons holding office, under the authority of the United States.

The statute seems to be about appellate jurisdiction and not original jurisdiction. If the Court had interpreted the law this way, *Marbury* would have lost on jurisdictional grounds and the Court never would have had occasion to reach the issue of whether the Supreme Court can review the constitutionality of federal laws.

That, of course, is part of the brilliance of Marbury v. Madison: Chief Justice John Marshall established judicial review while declaring unconstitutional a statute that he read as expanding the Court's powers. Politically, Marshall had no choice but to deny Marbury relief; the Jefferson administration surely would have refused to comply with a court order to deliver the commission. In addition, there was a real possibility that Jefferson might seek the impeachment of the Federalist justices in an attempt to gain Republican control of the judiciary. One judge, albeit a clearly incompetent jurist, already had been impeached, and not long after his removal, the House of Representatives impeached Justice Samuel Chase on the grounds that he had made electioneering statements from the bench and had criticized the repeal of the 1801 Circuit Court Act. (Chase was acquitted in the Senate and remained on the Court until his death in 1811.) Yet John Marshall did more than simply rule in favor of the Jefferson administration; he used the occasion of deciding Marbury v. Madison to establish the power of the judiciary and to articulate a role for the federal courts that survives to this day.

The Supreme Court did not declare another federal statute unconstitutional until 1857 in the infamous case of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), which invalidated the Missouri Compromise and helped to precipitate the Civil War.[2] By then, the power of the Court to consider the constitutionality of federal laws was an accepted part of American government.

Marbury v. Madison has been invoked by the Supreme Court in some of the most important cases in American history. For example, in Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court responded to Arkansas's refusal to obey a federal court order desegregating the Little Rock public schools by relying on the authority of Marbury v. Madison. In an unusual opinion, signed individually by each justice, the Court rejected Arkansas's position and emphatically

declared: “Article VI of the Constitution makes the Constitution ‘the supreme Law of the Land.’ . . . Marbury v. Madison . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . ‘to support this Constitution.’”

Similarly, in United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court ordered President Richard Nixon to produce tapes of White House conversations in connection with the Watergate investigation. In response to the president’s claims that he alone should determine the scope of executive privilege, Chief Justice Warren Burger, writing for the Court, stated: “The President’s counsel . . . reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’”

Marbury v. Madison thus provides the foundation for American constitutional law by establishing the authority for judicial review of executive and legislative acts.

AUTHORITY FOR JUDICIAL REVIEW OF STATE JUDGMENTS

Marbury v. Madison establishes only the authority for judicial review of federal executive and legislative actions. The authority for judicial review of state court decisions was established in two decisions early in the nineteenth century: Martin v. Hunter’s Lessee and Cohens v. Virginia.

MARTIN v. HUNTER’S LESSEE, 14 U.S. (1 Wheat.) 304 (1816): There were two competing claims to certain land within the state of Virginia. Martin claimed title to the land based on inheritance from Lord Fairfax, a British citizen who owned the property. The United States and England had entered into two treaties protecting the rights of British citizens to own land in the United States. However, Hunter claimed that Virginia had taken the land before the treaties came into effect and, hence, Martin did not have a valid claim to the property.

The Virginia Court of Appeals ruled in favor of Hunter and, in essence, in favor of the state’s authority to have taken and disposed of the land. The U.S. Supreme Court issued a writ of error and reversed the Virginia decision. The Supreme Court held that the federal treaty was controlling and that it established Lord Fairfax’s ownership and thus the validity of inheritance pursuant to his will. The Virginia Court of Appeals, however, declared that the Supreme Court lacked the authority to review state court decisions. The Virginia court stated that the “Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty—and, of course, their commands or instructions impose no obligation.”

The U.S. Supreme Court again granted review and declared the authority to review state court judgments. Justice Joseph Story wrote the opinion for the Court. Chief Justice John Marshall did not participate because he and his brother had contracted to purchase a large part of the Fairfax estate that was at issue in the litigation.

Justice Story argued that the structure of the Constitution presumes that the Supreme Court may review state court decisions. Story argued that the Constitution creates a Supreme Court

and gives Congress discretion whether to create lower federal courts. But if Congress chose not to establish such tribunals, then the Supreme Court would be powerless to hear any cases, except for the few fitting within its original jurisdiction, unless it could review state court rulings.

Additionally, Justice Story explained the importance of Supreme Court review of state courts. Justice Story said that although he assumed that "judges of the state courts are, and always will be, of as much learning, integrity, and wisdom as those of courts of the United States," the Constitution is based on a recognition that "state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Furthermore, Justice Story observed that Supreme Court review is essential to ensure uniformity in the interpretation of federal law. Justice Story concluded that the very nature of the Constitution, the contemporaneous understanding of it, and many years of experience all established the Supreme Court's authority to review state court decisions.

COHENS v. VIRGINIA, 19 U.S. (6 Wheat.) 264 (1821): Two brothers were convicted in Virginia state court of selling District of Columbia lottery tickets in violation of Virginia law. The defendants sought review in the United States Supreme Court because they claimed the Constitution prevented their prosecution for selling tickets authorized by Congress. Virginia argued: (1) in general, the Supreme Court had no authority to review state court decisions; and (2) in particular, review was not allowed in criminal cases and in cases where a state government was a party.

The Supreme Court, in an opinion by Chief Justice John Marshall, reaffirmed the constitutionality of §25 of the Judiciary Act and the authority of the Supreme Court to review state court judgments. The Court emphasized that state courts often could not be trusted to adequately protect federal rights because "[i]n many States the judges are dependent for office and for salary on the will of the legislature." The Court thus declared that criminal defendants could seek Supreme Court review when they claimed that their conviction violated the Constitution.

B. LIMITS ON THE FEDERAL JUDICIAL POWER

The judicial power to "say what the law is" gives to unelected federal judges great authority. There thus has been an ongoing, unresolved debate over how this power is constrained and whether the limits on judicial authority are sufficient. Three primary limits exist: interpretive limits, congressional limits, and justiciability limits. Interpretive limits raise the question of how the Constitution should be interpreted; some approaches seek to greatly narrow the judicial power, while others accord judges broad latitude in deciding the meaning of the Constitution. Congressional limits refer to the ability of Congress to restrict federal court jurisdiction. Justiciability limits refer to a series of judicially created doctrines that limit the types of matters that federal courts can decide.

1. Interpretive Limits

Much of the Constitution is written in broad, open-textured language. How should the Court, or anyone seeking to interpret the Constitution, give meaning to these words? What weight should be given to the text, to the framers' intent, to the practices at the time the constitutional provision was adopted, to tradition, to social policy needs? There is no agreement among Justices or

scholars as to the appropriate method of constitutional interpretation. Yet the resolution of every issue of constitutional law turns on this question.

The issue of how courts should interpret the Constitution is particularly controversial and, of course, at the core of the issues discussed throughout this book. On the one hand, some believe that it is essential that the Court's discretion in interpreting the Constitution be narrowly circumscribed to limit the judicial power. They argue that democracy means rule by electorally accountable officials and that judicial review by unelected federal judges is inconsistent with this. The late Yale law professor Alexander Bickel said that judicial review is a "deviant institution in American democracy" because it permits unelected judges to overturn the decisions of popularly accountable officials.[3] Robert Bork similarly remarked that a "Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."[4]

Those adopting this approach seek to constrain courts interpreting the Constitution. Some argue, for example, that the Court is justified in protecting constitutional rights only if they are clearly stated in the text or the original understanding of the Constitution was to protect them. Those who adopt this theory, often called originalism, defend it as a desirable way to limit unelected judges in a democratic society.[5] Originalism is the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[6]

Others disagree with these theories and argue that it is desirable for the Court to have substantial discretion in determining the meaning of the Constitution. Often called "nonoriginalists," they argue that it is important that the Constitution evolve by interpretation and not only by amendment. Nonoriginalism is the "view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[7] The claim is that nonoriginalist review is essential so that the Constitution does not remain virtually static, so that it can evolve to meet the needs of a society that is advancing technologically and morally.

Nonoriginalists argued, for example, that equal protection in the second half of the twentieth century must mean that government-mandated racial segregation is unacceptable; yet there is strong evidence that the framers of the Fourteenth Amendment approved this practice. The same Congress that ratified the Fourteenth Amendment also voted to segregate the District of Columbia public schools. The drafters of the Equal Protection Clause did not intend to protect women from discrimination, but it is widely accepted that the clause should apply to gender discrimination. Indeed, the argument is that under originalism it would be unconstitutional to elect a woman as president or vice president because the Constitution refers to these office holders with the word "he," and the framers clearly intended that they be male.

Originalists believe that the Court should find a right to exist in the Constitution only if it is expressly stated in the text or was clearly intended by its framers. If the Constitution is silent, originalists say it is for the legislature, unconstrained by the courts, to decide the law. Nonoriginalists think that it is permissible for the Court to interpret the Constitution to protect rights that are not expressly stated or clearly intended. Originalists believe that the Constitution should evolve solely by amendment; nonoriginalists believe that the Constitution's meaning can evolve by amendment and by interpretation.

But within these theories there is a wide range of different approaches. Some originalists argue that the framers' specific intent must be followed, while others maintain that only the framers' abstract intent is controlling. Justice Scalia argued that the focus should not be on the framers' intentions, but on the meaning of the Constitution as evidenced by the text and the practices at the time the Constitution was ratified. Similarly, among nonoriginalists there are those who emphasize tradition, those who stress natural law principles, those who say constitutional law should be about improving the processes of government, those who emphasize contemporary values, and other variants too.

For several decades now there has been an intense debate among justices and among scholars as to the appropriate method for interpreting the Constitution. There is a voluminous literature on this. The debate over how the Constitution should be interpreted—and the extent to which the method of interpretation should limit the judiciary—arises in all areas of constitutional law.

HOW SHOULD THE CONSTITUTION BE INTERPRETED? THE SECOND AMENDMENT AS AN EXAMPLE

In thinking about the debate over the appropriate method of interpretation, consider, as an example, the meaning of the Second Amendment, which states: "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." There is a heated debate among scholars, as well as in society, about the proper interpretation of the Second Amendment. On the one hand, some believe that the Second Amendment safeguards a right of individuals to keep and own firearms. From this perspective, laws that infringe this right are at least presumptively unconstitutional. On the other hand, some believe that the Second Amendment means only that there is a right to have guns for militia service.

The underlying issue, of course, is how should the Supreme Court—or a lower court or a member of Congress or you—decide the proper meaning of the Second Amendment. In June 2008, for the first time in U.S. history, the Supreme Court invalidated a law as violating the Second Amendment and held that the Second Amendment protects a right to have guns apart from militia service.

In reading District of Columbia v. Heller, focus on the interpretive methodology used by the majority and the dissents. What sources do they look to? What should they consider?

DISTRICT OF COLUMBIA v. HELLER

554 U.S. 570 (2008)

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. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. Wholly apart from that

prohibition, no 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 dissembled 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 Federal Judicial Center. 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."

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. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of 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." But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.

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. 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.

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

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 "weapons of offence, or armour of defence." Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 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, 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.

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." Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." 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.

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 most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which

enshrined a right of citizens to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.” It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit.

Justice Stevens places great weight on James Madison’s inclusion of a conscientious-objector clause in his original draft of the Second Amendment: “but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” He argues that this clause establishes that the drafters of the Second Amendment intended “bear Arms” to refer only to military service. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Thus, the most natural interpretation of Madison’s deleted text is that those opposed to carrying weapons for potential violent confrontation would not be “compelled to render military service,” in which such carrying would be required.

Finally, Justice Stevens suggests that “keep and bear Arms” was some sort of term of art, presumably akin to “hue and cry” or “cease and desist.” This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of “keep arms.” And even if “keep and bear Arms” were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation.

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. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.”

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.

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.

Petitioners take a seemingly narrower view of the militia, stating that “[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, §8, cls. 15-16).” Although we agree with petitioners’ interpretive assumption that “militia” means the same thing

in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, §8, cls. 12-13), the militia is assumed by Article I already to be in existence. Congress is given the power to "provide for calling forth the militia," §8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, ibid., cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training.

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 as the dissent below argued. There are many reasons why the militia was thought to be "necessary to the security of a free state." First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies -unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

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.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service.

North Carolina also codified a right to bear arms in 1776. Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 1770 Georgia law that "for the security and defence of this province from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship."

We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes.

Between 1789 and 1820, nine States adopted Second Amendment analogues. The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

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 preexisting 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 structural provisions that would have given the States concurrent and seemingly nonpreemptible 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 through the end of the 19th century. Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service. 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 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. Many early 19th-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions.

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. Since those discussions 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. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. It was plainly the understanding in the post-Civil War Congress that

the Second Amendment protected an individual right to use arms for self-defense. Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service.

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment. Justice Stevens places overwhelming reliance upon this Court's decision in United States v. Miller (1939). *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 convictions 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. Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). 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.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. The respondent made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government.

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."

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. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. 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.

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."

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. 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.

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. 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 Justice SOUTER, Justice GINSBURG, and Justice 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. Upholding a conviction under that 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." United States v. Miller. 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; we ourselves affirmed it in 1980. See Lewis v. United States (1980). 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.

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 postratification 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

The text of the Second Amendment is brief. It 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."

Three portions of that 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." In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.

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.

"The 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, "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.

"To 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.

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." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from the Latin arma ferre, which, translated literally, means "to bear [ferre] war equipment [arma]."

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. The Virginia military law, for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." "[K]eep and bear arms" thus perfectly describes the responsibilities of a framing-era militia member.

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden.

Indeed, not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the Second Amendment as "elevat[ing] above all other interests" "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the Second Amendment, represent quintessential examples of the Framers' "splitting the atom of sovereignty."

It is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."

Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text.

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. The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "'newly ascertained[]'"; the Court is unable to identify any such facts or arguments.

[IV]

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.

I do not know whether today's decision will increase the labor of federal judges to the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

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

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment. The majority, relying upon its view that the Second Amendment seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

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. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-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.

In respect to the first independent reason, I agree with Justice Stevens, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, not the primary objective) of those who wrote the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in

scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

[II]

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, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose." 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, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." 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." The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties. 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.

[III]

No one doubts the constitutional importance of the statute's basic objective, saving lives. But there is considerable debate about whether the District's statute helps to achieve that objective.

A

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." The committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years." It reported to the Council "startling statistics," regarding gun-related crime, accidents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District.

The committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. Three thousand of these deaths, the report stated, were accidental. A quarter of the victims in those accidental deaths were children under the age of 14. And according to the committee, "[f]or every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home."

In respect to local crime, the committee observed that there were 285 murders in the District during 1974—a record number. The committee report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. This did not appear to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. Nor were handguns only linked to murders, as statistics showed that they were used in roughly 60% of robberies and 26% of assaults. "A crime committed with a pistol," the committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." The committee furthermore presented statistics regarding the availability of handguns in the United States, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them.

Next, consider the facts as a court must consider them looking at the matter as of today.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U.S. hospitals, an average of over 82,000 per year. Of these, 62% resulted from assaults, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes.

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. Firearm-related deaths account for 22.5% of all injury deaths between the ages of 1 and 19. More male teenagers die from firearms than from all natural causes combined. Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992, and May 31, 1993.

Handguns are involved in a majority of firearm deaths and injuries in the United States. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death From Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun.

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime, than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime.

Finally, the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. “[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns.”

Finally, consider the claim of respondent’s amici that handgun bans cannot work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent’s amici point raise policy-related questions. They succeed in proving that the District’s predictive judgments are controversial. But they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its amici support the District’s handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District’s law has indeed had positive life-saving effects. See Loftin, McDowall, Weirsema, & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991). Others suggest that firearm restrictions as a general matter

reduce homicides, suicides, and accidents in the home. Still others suggest that the defensive uses of handguns are not as great in number as respondent's amici claim.

Respondent and his amici reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm legal conclusion.

In particular this Court, in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." And judges, looking at the evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from [that] standard for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.

For these reasons, I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called "compelling."

B

I next assess the extent to which the District's law burdens the interests that the Second Amendment seeks to protect. Respondent and his amici, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, e.g., hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

The District's statute burdens the Amendment's first and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a "well regulated Militia." What scant Court precedent there is on the Second Amendment teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view."

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. But in enacting the present provisions, the District sought "to take nothing away from sportsmen." And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the District's firearm laws. [T]he District's law does not prohibit possession of rifles or shotguns, and the

presence of opportunities for sporting activities in nearby States. [T]he District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

The District's law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self defense. To that extent the law burdens to some degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there other potential measures that might similarly promote the same goals while imposing lesser restrictions? Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that any handgun he sees is an illegal handgun. And there is no plausible way to achieve that objective other than to ban the guns.

D

The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative. I turn now to the final portion of the "permissible regulation" question: Does the District's law disproportionately burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the primary interest, but at most a subsidiary interest, that the Second Amendment seeks to serve. The Second Amendment's language, while speaking of a "Militia," says nothing of "self-defense."

Further, any self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. Insofar as the Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. They are

unlikely then to have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as central. And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the amendment's more basic protective ends.

Nor, for that matter, am I aware of any evidence that handguns in particular were central to the Framers' conception of the Second Amendment. The lists of militia-related weapons in the late 18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular.

Third, irrespective of what the Framers could have thought, we know what they did think. Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "construed" to "prevent the people of the United States, who are peaceable citizens, from keeping their own arms." And he doubtless knew that Massachusetts law prohibited Bostonians from keeping loaded guns in the house. So how could Samuel Adams have advocated such protection unless he thought that the protection was consistent with local regulation that seriously impeded urban residents from using their arms against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he kn[e]w Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time. As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

For these reasons, I conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it.[8]

Interestingly, in the decade after *Heller*, the Court did not take or decide any cases concerning the meaning of the Second Amendment despite many opportunities to do so. The lower courts have divided on many issues, such as whether there is a right to have guns outside the home. The Court's composition has changed since 2008 with Justices Souter, Stevens, Scalia, and Kennedy being replaced by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh. But the sense is that the current Court likely will be similarly split 5-4 between the views of the Second Amendment expressed in *Heller*.

2. Congressional Limits

Article III of the Constitution provides that 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." May Congress use this authority to restrict Supreme Court jurisdiction to hear particular types of cases so as to effectively overrule Supreme Court decisions? There is no definitive answer to this question, although many proposals have been introduced into Congress in an attempt to restrict jurisdiction to change the substantive law.

For example, during the 1950s, the Supreme Court invalidated some loyalty oaths for government workers and attorneys.[9] In response, the Jennings-Butler Bill was introduced in the U.S. Senate to prevent review of State Board of Bar Examiners' decisions concerning who could practice law in a state.[10] Altogether, since the 1940s, more than 100 proposals were introduced in Congress to restrict federal court jurisdiction over particular topics.[11] During the 1980s, there were proposals in Congress to prevent federal courts from hearing cases involving challenges to state laws permitting school prayers or state laws restricting access to abortions.[12] More recently, in June 2004, the House of Representatives passed a bill to prevent the Supreme Court or lower federal courts from interpreting or hearing challenges to the Defense of Marriage Act.[13] And in September 2004, the House passed a bill to preclude judicial review of the constitutionality of the Pledge of Allegiance.[14]

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In large part, the debate centers on two major constitutional issues: What does the language of Article III mean when it says that Supreme Court jurisdiction exists subject to such "exceptions and regulations" as Congress shall make? Does separation of powers limit the ability of Congress to restrict Supreme Court jurisdiction?

THE EXCEPTIONS AND REGULATIONS CLAUSE

Even after more than 200 years of American history, there is no consensus as to what the Constitution means when it provides that the Supreme Court possesses appellate jurisdiction "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." On one side of the debate are those who believe that this provides Congress with broad powers to remove matters from the Supreme Court's purview. The argument, in part, is that the framers of the Constitution intended such congressional control as a check on the judiciary's power.[15] Evidence of this intent, it is argued, is found in the fact that the first Congress did not vest the Supreme Court with appellate jurisdiction over all of the types of cases and controversies enumerated in Article III. For example, under the Judiciary Act of 1789, the Supreme Court had authority only to review decisions of a state's highest court that ruled against a federal constitutional claim.[16] It was not until the twentieth century that the Supreme Court was accorded power to review decisions of a state court that ruled in favor of a constitutional right.[17]

On the other side of the debate are those who believe that Congress is limited in its ability to control Supreme Court jurisdiction. Some argue that the term "Exceptions" in Article III was intended to modify the word "Fact."[18] The contention is that the framers were concerned about the Supreme Court's ability to overturn fact-finding by lower courts, especially when done by juries. Under this view, Congress could create an exception to the Supreme Court's jurisdiction for review of matters of fact, but Congress could not eliminate the Court's appellate jurisdiction for issues of law.

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Alternatively, it is argued that even though Congress is given authority to limit Supreme Court jurisdiction under the text of Article III, this power—like all congressional powers—cannot be used in a manner that violates the Constitution. Opponents of jurisdiction restriction contend that congressional preclusion of Supreme Court review of particular topics would violate other parts of the Constitution.

The primary Supreme Court case interpreting the Exceptions and Regulations Clause is Ex parte McCardle. In reading *McCardle*, consider whether it is precedent for a federal law precluding Supreme Court review of particular types of cases or whether it is distinguishable.

EX PARTE MCCARDLE

74 U.S. 506 (1868)

[McCardle was a newspaper editor in Vicksburg, Mississippi, who was arrested by federal officials for writing a series of newspaper articles that were highly critical of Reconstruction and especially of the military rule of the South following the Civil War. McCardle filed a petition for a writ of habeas corpus pursuant to a statute adopted in 1867 that permitted federal courts to grant habeas corpus relief to anyone held in custody in violation of the Constitution or laws of the United States by either a state government or the federal government. Before 1867, under the Judiciary Act of 1789, which was supplemented but not replaced by the 1867 law, federal courts could hear habeas petitions only of those who were held in federal custody.

McCardle contended that the Military Reconstruction Act was unconstitutional in that it provided for military trials for civilians. He also claimed that his prosecution violated specific Bill of Rights' provisions, including the First, Fifth, and Sixth Amendments. The U.S. government argued that the federal courts lacked jurisdiction to grant habeas corpus to McCardle under the 1867 act. The federal government read the 1867 statute, despite its language to the contrary, as providing federal court relief only for state prisoners. The Supreme Court rejected this contention and set the case for argument on the merits of McCardle's claim that the Military Reconstruction Act and his prosecution were unconstitutional.

On March 9, 1868, the Supreme Court held oral arguments on McCardle's constitutional claims. Three days later, on March 12, 1868, Congress adopted a rider to an inconsequential tax bill that repealed that part of the 1867 statute that authorized Supreme Court appellate review of writs of habeas corpus. Members of Congress stated that their purpose was to remove the *McCardle* case from the Supreme Court's docket and thus prevent the Court from potentially invalidating Reconstruction. Representative Wilson declared that the "amendment [repealing Supreme Court authority under the 1867 act is] aimed at striking at a branch of the jurisdiction of the Supreme Court . . . thereby sweeping the [*McCardle*] case from the docket by taking away the jurisdiction of the Court."

On March 25, 1868, President Andrew Johnson vetoed the attempted repeal of Supreme Court jurisdiction. This was five days before the Senate was scheduled to begin its impeachment trial of President Johnson and the grounds for impeachment focused solely on his alleged obstruction of Reconstruction. Congress immediately overrode President Johnson's veto on March 27, 1868.

The Supreme Court then considered whether it had jurisdiction to hear McCardle's constitutional claims in light of the recently adopted statute denying it authority to hear appeals under the 1867 act that was the basis for jurisdiction in McCardle's petition.]

Chief Justice CHASE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

Less than a year after its decision in *McCardle*, the Supreme Court in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868), held that it had authority to review habeas corpus decisions of lower federal courts under the Judiciary Act of 1789. Like *McCardle*, *Yerger* involved a newspaper editor's challenge to the constitutionality of the Military Reconstruction Act. After the Supreme Court upheld its jurisdiction to decide Yerger's constitutional claims, the federal military authorities dismissed all charges against him, thereby again preventing Supreme Court review of the constitutionality of Reconstruction.

SEPARATION OF POWERS AS A LIMIT ON CONGRESS'S AUTHORITY

To what extent does separation of powers limit the ability of Congress to exercise control over Supreme Court decision making? The primary Supreme Court decision finding a federal law unconstitutional on the grounds that it violates separation of powers is United States v. Klein. In reading *Klein*, consider what limits it imposes on Congress's ability to control or restrict Supreme Court jurisdiction.

UNITED STATES v. KLEIN

80 U.S. 128 (1871)

[In 1863, Congress adopted a statute providing that individuals whose property was seized during the Civil War could recover the property, or compensation for it, upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held that a presidential pardon fulfilled the statutory requirement of demonstrating that an individual was not a supporter of the rebellion.

In response to this decision and frequent pardons issued by the president, Congress quickly adopted a statute providing that a pardon was inadmissible as evidence in a claim for return of seized property. Moreover, the statute provided that a pardon, without an express disclaimer of guilt, was proof that the person aided the rebellion and would deny the federal courts jurisdiction over the claims. The statute declared that upon "proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."]

Chief Justice CHASE delivered the opinion of the court.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor . . . if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, “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.”

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

NOTES ON UNITED STATES v. KLEIN

There have been many occasions in which Congress has reacted to a Supreme Court decision interpreting a statute by adopting a law effectively overruling the Court's ruling. In essence, Congress is directing the results in future cases. The key question is whether this is distinguishable from *Klein*. The Supreme Court distinguished *Klein* in the following more recent cases.

ROBERTSON v. SEATTLE AUDUBON SOCIETY, 503 U.S. 429 (1992): The Department of Interior and Related Agencies Appropriations Act of 1990 required the Bureau of Land Management to offer specified land for sale and also imposed restrictions on harvesting from other land. Additionally, the act expressly noted two pending cases and said that "Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on [the specified lands] is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two lawsuits]."

The Supreme Court rejected the argument that Congress was directing the outcome of the pending litigation. The Supreme Court held that Congress had changed the law itself and did not direct findings or results under the old law. The Court said that *Klein* applies in a situation where Congress directs the judiciary as to decision making under an existing law and does not apply when Congress adopts a new law. The Court found that as a new law the statute was constitutional.

BANK MARKAZI v. PETERSON, 136 S. Ct. 1310 (2016): American nationals may seek money damages from state sponsors of terrorism in the courts of the United States. Prevailing plaintiffs, however, often face practical and legal difficulties enforcing their judgments. To place beyond dispute the availability of certain assets for satisfaction of judgments rendered in terrorism cases against Iran, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012. The Act makes a designated set of assets available to satisfy the judgments in a specific case, designated by docket number.

Plaintiffs—more than 1,000 victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members—brought suit against Iran. They obtained default judgments and moved for the turnover of about $1.75 billion in bond assets held in a New York bank account—assets that they alleged were owned by Bank Markazi, the Central Bank of Iran. The Bank argued that the federal statute violated separation of powers because it usurped the judicial role by directing a particular result in the pending enforcement proceeding.

Justice Ginsburg, writing for the Court in a 6-2 decision, held that the statute does not violate separation of powers. The Court explained that Article III bars Congress from telling a court how to apply preexisting law to particular circumstances. But Congress may amend a law and make the amended prescription retroactively applicable in pending cases. The statute does just that: It requires a court to apply a new legal standard in a pending postjudgment enforcement proceeding. It does not matter that it meant that the result in the case was a "foregone conclusion." A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. Nor is the statute invalid because it prescribes a rule for a single, pending case identified by caption and docket number (and actually it was 16 cases).

Chief Justice Roberts, joined by Justice Sotomayor, dissented. They said that the law violates the separation of powers. "No less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory."

These cases establish no clear principles as to what the phrase "exceptions and regulations" means or when separation of powers prevents Congress from changing the law in response to a Supreme Court decision interpreting a statute. Ultimately, the arguments about Congress's ability to check the federal judiciary, like so many areas of constitutional law, turn on disputes about the meaning of the Constitution's language, the intent of its framers, and the competing policy considerations.

3. Justiciability Limits

Article III, §2 authorizes federal courts to hear several types of "cases" and "controversies." The Supreme Court has interpreted these words as giving rise to a series of limits on the federal judicial power. These limits are frequently referred to as justiciability doctrines. The justiciability doctrines are all judicially created limits on the matters that can be heard in federal courts. The Supreme Court has declared that some of these are "constitutional," meaning that Congress by statute cannot override them. The Court also has said that some of the doctrines are "prudential," meaning that they are based on prudent judicial administration and can be overridden by Congress since they are not constitutional requirements.

All of the justiciability doctrines raise basic policy questions about the proper role of the federal judiciary in a democratic society. As Chief Justice Warren explained, the "words [cases and controversies] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[19] The justiciability doctrines also are intended to improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution. The Supreme Court explained that the requirement for cases and controversies "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[20] Moreover, the justiciability doctrines, by limiting the availability of federal court review, conserve judicial resources.

There are five major justiciability doctrines: the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine. All must be met for any federal court, at any level, to hear a case.[21]

In addition to the justiciability doctrines, the Supreme Court has said that it would follow certain "principles of avoidance" to ensure that it will reach constitutional questions only when necessary. The most famous articulation of these "avoidance principles" was by Justice Louis Brandeis in a concurring opinion in Ashwander v. Tennessee Valley Authority.[22] Justice Brandeis wrote:

> Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it. The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
>
> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a nece\ssity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."
>
> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."
>
> 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained.
>
> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
>
> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will

first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Some of these requirements overlap with the justiciability doctrines discussed below. Some are additional principles of restraint. As you examine the five justiciability doctrines—prohibition of advisory opinions, standing, ripeness, mootness, and the political question doctrine—consider the extent to which they embody Brandeis's principles of judicial restraint in constitutional cases.

a. Prohibition of Advisory Opinions

The core of Article III's requirement for cases and controversies is that federal courts cannot issue advisory opinions. What are the characteristics that must be present in a lawsuit to avoid being an advisory opinion? First, there must be an actual dispute between adverse litigants.

OPINION OF THE JUSTICES, reprinted in Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 92-93 (4th ed. 1996): Early in American history, a conflict occurred between France and England. The United States adopted a position of neutrality. Secretary of State Thomas Jefferson asked the Supreme Court for its answers to a long list of questions concerning America's conduct as a neutral party. In his letter to the Justices, Jefferson said that "[t]he President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the [Court], whose knowledge of the subject would secure us against errors dangerous to the peace of the United States." For example, Jefferson asked the Justices, "May we, within our own ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?"

The Justices wrote back to President Washington and declined to answer the questions asked. The Justices, in their letter, stated: "[The] three departments of the government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to." The Justices concluded their letter: "We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States."

Second, in order for a case to be justiciable and not an advisory opinion, there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect. This requirement also dates back to the Supreme Court's earliest days.

HAYBURN'S CASE, 2 U.S. (2 Dall.) 409 (1792): Congress adopted a law permitting Revolutionary War veterans to file pension claims in the U.S. Circuit Courts. The judges of these courts were to inform the secretary of war of the nature of the claimant's disability and the amount of benefits to be paid. The secretary could refuse to follow the court's recommendation.

Five Supreme Court justices, while sitting as circuit judges, found this approach unconstitutional. The justices explained that the duty of making recommendations regarding pensions was "not of a judicial nature." They said that it would violate separation of powers because the judicial actions might be "revised and controuled by the legislature, and by an officer in the executive

department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."

Consider the application of this principle in a more recent context in the following case:

PLAUT v. SPENDTHRIFT FARM, INC.

514 U.S. 211 (1995)

[In 1991, the Court ruled that actions brought under the securities laws, specifically §10(b) and Rule 10(b)(5), had to be brought within one year of discovering the facts giving rise to the violation and three years of the violation. Congress then amended the law to allow cases that were filed before this decision to go forward if they could have been brought under the prior law. The effect of the statute was to reopen actions that had been dismissed under the Court's prior ruling.]

Justice SCALIA delivered the opinion of the Court.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in United States v. Klein (187[1]), where we refused to give effect to a statute that was said "[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it." Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." Robertson v. Seattle Audubon Soc. (1992). Section 27A(b) indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively). The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by Hayburn's Case, 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. Yet under any application of §27A(b) only courts are involved; no officials of other departments sit in direct review of their decisions. Section 27A(b) therefore offends neither of these previously established prohibitions.

We think, however, that §27A(b) offends a postulate of Article III just as deeply rooted in our law as those we have mentioned. Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. Marbury v. Madison (1803). The record of history shows that the framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.

Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed. It is, of course, retroactive legislation, that is, legislation that prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislation occurred—in this case, the filing of the initial Rule 10b-5 action in the District Court.

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.

To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment. The judgment of the Court of Appeals is affirmed.

NOTES ON ADVISORY OPINIONS

Many of the other justiciability doctrines implement the prohibition against advisory opinions. For instance, the standing requirement for an injury, the need that a case be ripe, and that it not be moot, all seek to ensure that there is an actual dispute between adverse litigants. Similarly, the standing requirement that the plaintiff demonstrate that the defendant is the cause of the injury so that a favorable court decision will remedy the harm seeks to ensure that a federal court ruling will make a difference.

Earlier in this century, courts expressed concern over whether requests for declaratory judgments were advisory opinions. Initially, the Supreme Court expressed doubts about whether suits for declaratory judgments could be justiciable. *See* Piedmont & Northern Ry. Co. v. United States, 280 U.S. 469 (1930); Willing v. Chicago Auditorium Assn., 277 U.S. 274 (1928). Subsequently, the Supreme Court said that suits for declaratory judgments are justiciable as long as they meet the requirements for judicial review.

NASHVILLE, C. & ST. L. RY. v. WALLACE, 288 U.S. 249 (1933): A company sought a declaratory judgment that a tax was an unconstitutional burden on interstate commerce. The Supreme Court explained that because the matter would have been justiciable as a request for an injunction, the suit for a declaratory judgment was capable of federal court adjudication. Justice Stone, writing for the majority, explained, "The Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. [Article III] did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy." The Court emphasized that the focus was on "substance" and "not with form" and that the case was justiciable "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy."

b. Standing

Standing is the second major justiciability requirement. Indeed, the Supreme Court has declared that standing is the most important justiciability requirement. Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication. The Supreme Court has declared: "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490 (1975).

There are several requirements that must be met in order for a plaintiff to have standing.[23] Although all are judicially created, the Court has said that some are based on its interpretation of Article III, and thus constitutionally required, while others are prudential. There are three constitutional standing requirements. First, the plaintiff must allege that he or she has suffered or imminently will suffer an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant's conduct. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the injury. In addition to these constitutional requirements, the Court also has identified two major prudential standing principles. Unlike constitutional barriers, Congress may override prudential limits by statute. First, a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court. Second, a plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers.

i. *Constitutional Standing Requirements*

The following two cases, Allen v. Wright and Massachusetts v. Environmental Protection Agency, are major rulings concerning the meaning of the three constitutional standing requirements: injury, causation, and redressability. In reading these cases, consider what types of injuries are sufficient for standing? What must a plaintiff allege and prove in order to meet the causation and redressability requirements? Underlying these cases is the question of whether the standing doctrine is appropriately applied to properly limit the role of the federal judiciary or whether the Court has unduly prevented the federal courts from fulfilling their responsibility of enforcing the Constitution and federal laws.

ALLEN v. WRIGHT

468 U.S. 737 (1984)

Justice O'Connor delivered the opinion of the Court.

Parents of black public school children allege in this nation-wide class action that the Internal Revenue Service (IRS) has not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. They assert that the IRS thereby harms them directly and interferes with the ability of their children to receive an education in desegregated public schools. The issue before us is whether plaintiffs have standing to bring this suit. We hold that they do not.

I

The IRS denies tax-exempt status under the Internal Revenue Code, and hence eligibility to receive charitable contributions deductible from income taxes to racially discriminatory private schools. The IRS policy requires that a school applying for tax-exempt status show that it "admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." To carry out this policy, the IRS has established guidelines and procedures for determining whether a particular school is in fact racially nondiscriminatory. Failure to comply with the guidelines "will ordinarily result in the proposed revocation of " tax-exempt status.

In 1976 respondents challenged these guidelines and procedures in a suit filed in Federal District Court against the Secretary of the Treasury and the Commissioner of Internal Revenue. The plaintiffs named in the complaint are parents of black children who, at the time the complaint was filed, were attending public schools in seven States in school districts undergoing desegregation. They brought this nationwide class action "on behalf of themselves and their children, and . . . on behalf of all other parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation pursuant to court order [or] HEW regulations and guidelines, under state law, or voluntarily." They estimated that the class they seek to represent includes several million persons.

Respondents allege in their complaint that many racially segregated private schools were created or expanded in their communities at the time the public schools were undergoing desegregation. According to the complaint, many such private schools, including 17 schools or school systems identified by name in the complaint (perhaps some 30 schools in all), receive tax exemptions either directly or through the tax-exempt status of "umbrella" organizations that operate or support the schools. Respondents allege that the challenged Government conduct harms them in two ways. The challenged conduct

> (a) constitutes tangible federal financial aid and other support for racially segregated educational institutions, and
>
> (b) fosters and encourages the organization, operation and expansion of institutions providing racially segregated educational opportunities for white children avoiding attendance in desegregating public school districts and thereby interferes with the efforts of federal courts, HEW and local school authorities to desegregate public school districts which have been operating racially dual school systems.

Thus, respondents do not allege that their children have been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge as unlawful. Indeed, they have not alleged at any stage of this litigation that their children have ever applied or would ever apply

to any private school. Rather, respondents claim a direct injury from the mere fact of the challenged Government conduct and, as indicated by the restriction of the plaintiff class to parents of children in desegregating school districts, injury to their children's opportunity to receive a desegregated education. The latter injury is traceable to the IRS grant of tax exemptions to racially discriminatory schools, respondents allege, chiefly because contributions to such schools are deductible from income taxes under §§170(a)(1) and (c)(2) of the Internal Revenue Code and the "deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts."

II

A

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." As the Court explained in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." Warth v. Seldin (1975). The case-or- controversy doctrines state fundamental limits on federal judicial power in our system of government.

The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "'distinct and palpable,'" and not "abstract" or "conjectural" or "hypothetical." The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

More important, the law of Art. III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application. Of course, both federal and state courts have long experience in applying and elaborating in numerous contexts the pervasive and fundamental notion of separation of powers.

Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial

examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process."

B

Respondents allege two injuries in their complaint to support their standing to bring this lawsuit. First, they say that they are harmed directly by the mere fact of Government financial aid to discriminatory private schools. Second, they say that the federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated.

We conclude that neither suffices to support respondents' standing. The first fails under clear precedents of this Court because it does not constitute judicially cognizable injury. The second fails because the alleged injury is not fairly traceable to the assertedly unlawful conduct of the IRS.[24]

Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race. Under neither interpretation is this claim of injury judicially cognizable.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. In Schlesinger v. Reservists Committee to Stop the War (1974), for example, the Court rejected a claim of citizen standing to challenge Armed Forces Reserve commissions held by Members of Congress as violating the Incompatibility Clause of Art. I, §6, of the Constitution. As citizens, the Court held, plaintiffs alleged nothing but "the abstract injury in nonobservance of the Constitution. . . ." "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." Respondents here have no standing to complain simply that their Government is violating the law.

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.

The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the

particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP (1973). Constitutional limits on the role of the federal courts preclude such a transformation.

It is in their complaint's second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.

The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court."

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative, as respondents themselves conceded in the Court of Appeals, whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In Simon v. Eastern Kentucky Welfare Rights Org., the Court held that standing to challenge a Government grant of a tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents. The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action. The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and

the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, §3. We could not recognize respondents' standing in this case without running afoul of that structural principle.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

Three propositions are clear to me: (1) respondents have adequately alleged "injury in fact"; (2) their injury is fairly traceable to the conduct that they claim to be unlawful; and (3) the "separation of powers" principle does not create a jurisdictional obstacle to the consideration of the merits of their claim.

I

Respondents, the parents of black school-children, have alleged that their children are unable to attend fully desegregated schools because large numbers of white children in the areas in which respondents reside attend private schools which do not admit minority children. This kind of injury may be actionable whether it is caused by the exclusion of black children from public schools or by an official policy of encouraging white children to attend nonpublic schools. A subsidy for the withdrawal of a white child can have the same effect as a penalty for admitting a black child.

II

In final analysis, the wrong respondents allege that the Government has committed is to subsidize the exodus of white children from schools that would otherwise be racially integrated. The critical question in these cases, therefore, is whether respondents have alleged that the Government has created that kind of subsidy.

In answering that question, we must of course assume that respondents can prove what they have alleged. Furthermore, at this stage of the litigation we must put to one side all questions about the appropriateness of a nationwide class action. The controlling issue is whether the causal connection between the injury and the wrong has been adequately alleged.

We have held that when a subsidy makes a given activity more or less expensive, injury can be fairly traced to the subsidy for purposes of standing analysis because of the resulting increase or decrease in the ability to engage in the activity. Indeed, we have employed exactly this causation analysis in the same context at issue here—subsidies given private schools that practice racial discrimination.

This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased. Sections 170 and 501(c)(3) are premised on that recognition. If racially discriminatory private schools lose the "cash grants" that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased. Conversely, maintenance of these tax benefits makes an education in segregated private schools relatively more attractive, by decreasing its cost. Accordingly, without tax-exempt status, private schools will either not be competitive in terms of cost, or have to change their admissions policies, hence reducing their competitiveness for parents seeking "a racially segregated alternative" to public schools, which is what respondents have alleged many white parents in desegregating school districts seek.

III

Considerations of tax policy, economics, and pure logic all confirm the conclusion that respondents' injury in fact is fairly traceable to the Government's allegedly wrongful conduct. The Court therefore is forced to introduce the concept of "separation of powers" into its analysis. The Court writes that the separation of powers "explains why our cases preclude the conclusion" that respondents' injury is fairly traceable to the conduct they challenge.

The Court could mean one of three things by its invocation of the separation of powers. First, it could simply be expressing the idea that if the plaintiff lacks Art. III standing to bring a lawsuit, then there is no "case or controversy" within the meaning of Art. III and hence the matter is not within the area of responsibility assigned to the Judiciary by the Constitution. While there can be no quarrel with this proposition, in itself it provides no guidance for determining if the injury respondents have alleged is fairly traceable to the conduct they have challenged.

Second, the Court could be saying that it will require a more direct causal connection when it is troubled by the separation of powers implications of the case before it. That approach confuses the standing doctrine with the justiciability of the issues that respondents seek to raise. The purpose of the standing inquiry is to measure the plaintiff's stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks.

Third, the Court could be saying that it will not treat as legally cognizable injuries that stem from an administrative decision concerning how enforcement resources will be allocated. This surely is an important point. Respondents do seek to restructure the IRS's mechanisms for enforcing the legal requirement that discriminatory institutions not receive tax-exempt status. Such restructuring would dramatically affect the way in which the IRS exercises its prosecutorial discretion. The Executive requires latitude to decide how best to enforce the law, and in general the Court may well be correct that the exercise of that discretion, especially in the tax context, is unchallengeable.

However, as the Court also recognizes, this principle does not apply when suit is brought "to enforce specific legal obligations whose violation works a direct harm." For example, despite the fact that they were challenging the methods used by the Executive to enforce the law, citizens

were accorded standing to challenge a pattern of police misconduct that violated the constitutional constraints on law enforcement activities in Allee v. Medrano (1974). Here, respondents contend that the IRS is violating a specific constitutional limitation on its enforcement discretion. There is a solid basis for that contention.

MASSACHUSETTS v. ENVIRONMENTAL PROTECTION AGENCY

549 U.S. 497 (2007)

Justice STEVENS delivered the opinion of the Court.

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

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

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that we may not address those two questions unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution.

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." Those two words confine "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. See 42 U.S.C. §7607(b)(1). That authorization is of critical importance to the standing inquiry: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." "In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr (1962).

To ensure the proper adversarial presentation, Lujan v. Defenders of Wildlife (1992) holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests,"—here, the right to challenge agency action unlawfully withheld, §7607(b)(1)—"can assert that right without meeting all the normal standards for redressability and immediacy." When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

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

Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction. That Massachusetts does in fact own a great deal of the "territory alleged to be affected" only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.

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

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

The Injury

The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself—which EPA regards as an "objective and independent assessment of the relevant science[],"—identifies a number of environmental changes that have already inflicted significant harms, including "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years. . . ."

Petitioners allege that this only hints at the environmental damage yet to come. According to the climate scientist Michael MacCracken, "qualified scientific experts involved in climate change research" have reached a "strong consensus" that global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, "severe and irreversible changes to natural ecosystems," a "significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences," and an increase in the spread of disease. He also observes that rising ocean temperatures may contribute to the ferocity of hurricanes.

That these climate-change risks are "widely shared" does not minimize Massachusetts' interest in the outcome of this litigation. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be "either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events." Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars.

Causation

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

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

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

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

THE REMEDY

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

[Justice Stevens then went on to hold that the EPA had statutory authority to promulgate regulations dealing with global warming and either had to do so or justify not doing so.]

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

Global warming may be a "crisis," even "the most pressing environmental problem of our time." Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.

Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here "is the function of Congress and the Chief Executive," not the federal courts.

I

Our modern framework for addressing standing is familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Applying that standard here, petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency's failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.

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

Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such "special solicitude" is

conspicuously absent from the Court's opinion.

II

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

When the Court actually applies the three-part test, it focuses on the State's asserted loss of coastal land as the injury in fact. If petitioners rely on loss of land as the Article III injury, however, they must ground the rest of the standing analysis in that specific injury. That alleged injury must be "concrete and particularized," and "distinct and palpable." Central to this concept of "particularized" injury is the requirement that a plaintiff be affected in a "personal and individual way," and seek relief that "directly and tangibly benefits him" in a manner distinct from its impact on "the public at large."

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

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

As to "actual" injury, the Court observes that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming" and that "[t]hese rising seas have already begun to swallow Massachusetts' coastal land." But none of petitioners' declarations supports that connection. [A]side from a single conclusory statement, there is nothing in petitioners' 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture.

The Court's attempts to identify "imminent" or "certainly impending" loss of Massachusetts coastal land fares no better. [A]ccepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact."

III

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

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

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

This gets us only to the relevant greenhouse gas emissions; linking them to global warming and ultimately to petitioners' alleged injuries next requires consideration of further complexities.

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

IV

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

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

make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

The good news is that the Court's "special solicitude" for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court's self-professed relaxation of these Article III requirements has caused us to transgress "the proper—and properly limited—role of the courts in a democratic society."

NOTES ON CONSTITUTIONAL STANDING REQUIREMENTS: INJURY, CAUSATION, AND REDRESSABILITY

Injury

In both of these cases, the Supreme Court emphasizes that injury is a core requirement of Article III in order for there to be a case or controversy. The cases discuss, at length, what types of injuries are sufficient to meet the standing requirement. The cases also are clear that it must be an injury that the plaintiff personally has suffered or imminently will suffer. In connection with this requirement, consider the following two cases, in which the Supreme Court rejected standing on the ground that the plaintiff failed to adequately demonstrate a personally suffered injury. In each, consider whether you agree with the Court's conclusion that the injury requirement was not fulfilled.

CITY OF LOS ANGELES v. LYONS, 461 U.S. 95 (1983): Justice WHITE delivered the opinion of the court:

Adolph Lyons filed a complaint for damages, injunction, and declaratory relief against the City of Los Angeles and four of its police officers. The complaint alleged that on October 6, 1976, at 2 a.m., Lyons was stopped by the defendant officers for a traffic or vehicle code violation and that although Lyons offered no resistance or threat whatsoever, the officers, without provocation or justification, seized Lyons and applied a "chokehold" rendering him unconscious and causing damage to his larynx.

Originally, Lyons's complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May, 1982, there had been five more such deaths.

Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons's standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in

the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation.

Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.

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

The District Court found that the City of Los Angeles authorizes its police officers to apply life-threatening chokeholds to citizens who pose no threat of violence, and that respondent, Adolph Lyons, was subjected to such a chokehold. The Court today holds that a federal court is without power to enjoin the enforcement of the City's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach to standing.

LUJAN v. DEFENDERS OF WILDLIFE, 504 U.S. 555 (1992): Justice SCALIA delivered the opinion of the court.

A challenge was brought to a rule promulgated by the Secretary of the Interior interpreting Section 7 of the Endangered Species Act concerning when the federal government could comply with the Endangered Species Act. Under the rule, the federal government would comply with the Act only for actions taken in the United States or on the high seas. Citizens brought a suit challenging the new regulation, having standing, in part, on a provision in the Act authorizing citizen standing.

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Of

course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in th[e] subject." With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered [N]ile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan." Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future."

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

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

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

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication." Allen v. Wright.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, *see, e.g.*, 16 U.S.C. §1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); §1535(d)(1) ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the agencies, *see* §1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies. The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. The agencies were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the

projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. It is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses Kelly's and Skilbred's general statements that they intended to revisit the project sites as "simply not enough." But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again.

By requiring a "description of concrete plans" or "specification of when the some day [for a return visit] will be," the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. To be sure, a plaintiff's unilateral control over his or her exposure to harm does not necessarily render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she would not have accepted work at another hospital instead. And a Federal Tort

Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison (1803).

CLAPPER v. AMNESTY INTERNATIONAL USA, 568 U.S. 398 (2013): Justice ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978 allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval.

Respondents are attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad. Respondents believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under §1881a. Specifically, respondents claim that they communicate by telephone and e-mail with people the Government "believes or believed to be associated with terrorist organizations," "people located in geographic areas that are a special focus" of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government.

Respondents seek a declaration that §1881a is unconstitutional, as well as an injunction against §1881a-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under §1881a at some point in the future. But respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to §1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of §1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of 50 U.S.C. §1881a, will harm them by intercepting at least some of their private,

foreign, telephone, or e-mail conversations. In my view, this harm is not "speculative." Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. This Court has often found the occurrence of similar future events sufficiently certain to support standing. I dissent from the Court's contrary conclusion.

Causation and Redressability

Allen and *Lujan* also make clear that there are two other constitutional requirements for standing: The plaintiff must allege and prove that the defendant caused the harm, so that it is likely that a favorable court decision will remedy the injury. Although the cases express that causation and redressability are distinct constitutional requirements, they are obviously interrelated.

The causation/redressability standing requirement has been more controversial than the injury requirement. On the one hand, it can be argued that this requirement simply implements the prohibition against advisory opinions; if a federal court decision will have little effect, if it will not redress the injuries, then it is an advisory opinion. On the other hand, it can be argued that causation and redressability are inappropriate determinations to make on the basis of the pleadings. All decisions about standing initially are made on the basis of the pleadings, assuming all allegations within them to be true. The criticism is that redressability is inherently a factual question—how likely it is that a favorable court decision will have a particular effect—that should not be made at the outset of a lawsuit. Traditionally, courts consider whether equitable relief will have the desired effect at the remedy stage, after there has been an opportunity for discovery and a hearing on the merits.

To appraise these competing views, and to understand the requirements, it is useful to consider the major cases, in addition to *Allen* and *Lujan*, where the Court has applied causation and redressability.

LINDA R. S. v. RICHARD D., 410 U.S. 614 (1973): An unwed mother sued to have the father of her child prosecuted for failure to pay child support. The mother challenged the Texas policy of prosecuting fathers of legitimate children for not paying required child support but not prosecuting fathers of illegitimate children. The Supreme Court dismissed the case for lack of standing, explaining that an injunction commanding state prosecutions would not ensure that the mother would receive any additional child support money. Justice Thurgood Marshall, writing for the Court, stated, "[I]f appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution, at least in the future, will result in payment of support can, at best, be termed only speculative."

WARTH v. SELDIN, 422 U.S. 490 (1975): Several plaintiffs challenged the constitutionality of zoning practices in Penfield, New York, a suburb of Rochester. The plaintiffs included Rochester residents who wanted to live in Penfield but claimed that they could not because of the zoning practices that prevented construction of multifamily dwellings and low-income housing. Also, an association of home builders that wanted to construct such housing joined as plaintiffs in the suit.

The Supreme Court held that these plaintiffs lacked standing because they could not demonstrate that appropriate housing would be constructed without the exclusionary zoning

ordinances. The Court felt that the low-income residents seeking to live in Penfield might not be able to afford to live there even if the town's zoning ordinances were invalidated. Also, the builders might not choose to construct new housing in Penfield, regardless of the outcome of the lawsuit. Justice Powell, writing for the Court, stated, "But the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners."

SIMON v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, 426 U.S. 26 (1976): A federal law required that hospitals provide free care to indigents in order to receive tax-exempt status. The plaintiffs were individuals who claimed that they requested and were denied needed medical care by tax-exempt hospitals. The plaintiffs challenged an Internal Revenue Service revision of a Revenue Ruling limiting the amount of free medical care that hospitals receiving tax-exempt status were required to provide. Whereas previously tax-exempt charitable hospitals had to provide free care for indigents, under the new provisions only emergency medical treatment of indigents was required.

The Supreme Court denied standing, concluding that it was "purely speculative" whether the new Revenue Ruling was responsible for the denial of medical services to the plaintiffs and that "the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire."

DUKE POWER CO. v. CAROLINA ENVIRONMENTAL STUDY GROUP, INC., 438 U.S. 59 (1978): Forty individuals and two organizations challenged the constitutionality of the Price-Anderson Act, which limits the liability of utility companies in the event of a nuclear reactor accident. The claim was that the Price-Anderson Act violated the Due Process Clause because it allowed injuries to occur without compensation.

The defendant moved to dismiss the case on the ground that the injury was purely speculative: No catastrophic nuclear accident had occurred, no one had been denied compensation, and perhaps no one ever would suffer the injury. The Supreme Court found standing to exist because the construction of a nuclear reactor in the plaintiffs' area subjected them to many injuries, including exposure to radiation, thermal pollution, and fear of a major nuclear accident. The Court concluded that the causation and redressability tests were met because *but for* the Price-Anderson Act the reactor would not be built and the plaintiffs would not suffer these harms. After finding standing, the Court held that the Price-Anderson Act was constitutional.

ii. *Prudential Standing Requirements*

There are two major prudential standing requirements: the prohibition of third-party standing and the prohibition of generalized grievances.[25] Like the constitutional standing requirements of injury, causation, and redressability, the prudential requirements are judicially created. The difference, though, is that Congress, by statute, can overrule the prudential requirements because they are derived not from the Constitution but instead from the Court's view of prudent judicial administration.

THE PROHIBITION OF THIRD-PARTY STANDING

The Supreme Court has stated that “even when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, the Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”[26] A plaintiff can assert only injuries that he or she has suffered; a plaintiff cannot present the claims of third parties who are not part of the lawsuit.

The Supreme Court, however, has recognized exceptions to this requirement. These are situations where a plaintiff who meets the other standing requirements may present the claims of a third party. The following case explains the prohibition of third-party standing and the exceptions to this rule.

SINGLETON v. WULFF

428 U.S. 106 (1976)

Justice BLACKMUN delivered the opinion of the Court:

This case involves a claim of a State’s unconstitutional interference with the decision to terminate pregnancy. The particular object of the challenge is a Missouri statute excluding abortions that are not “medically indicated” from the purposes for which Medicaid benefits are available to needy persons. In its present posture, however, the case presents [an issue] not going to the merits of this dispute: whether the plaintiff-appellees, as physicians who perform nonmedically indicated abortions, have standing to maintain the suit, to which we answer that they do.

I

The suit was filed in the United States District Court for the Eastern District of Missouri by two Missouri-licensed physicians. Each plaintiff avers, in an affidavit filed in opposition to a motion to dismiss, that he “has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments.” The plaintiffs further allege in their affidavits that all Medicaid applications filed in connection with abortions performed by them have been refused by the defendant, who is the responsible state official, in reliance on the challenged statutory provision. In any event, each plaintiff states that he anticipates further refusals by the defendant to fund nonmedically indicated abortions.

II

Two distinct standing questions are presented. First, whether the plaintiff-respondents allege “injury in fact,” that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court’s Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-respondents are proper proponents of the particular legal rights on which they base their suit.

A. The first of these questions needs little comment for there is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute. Their complaint and affidavits allege that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are “medically indicated.” If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the

abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.

B. The question of what rights the doctors may assert in seeking to resolve that controversy is more difficult. Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis. These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."

Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Application of these principles to the present case quickly yields its proper result. The closeness of the relationship is patent, as it was in *Griswold* and in *Doe*. A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. 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. 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. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion. It is true that these obstacles are not

insurmountable. Suit may be brought under a pseudonym, as so frequently has been done. A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is "'capable of repetition yet evading review.'" And it may be that a class could be assembled, whose fluid membership always included some women with live claims. But if the assertion of the right is to be "representative" to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician.

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 focuses on two factors in determining whether a plaintiff can sue on behalf of a third party: the closeness of the relationship between the plaintiff and the injured third party, and the likelihood that the third party can sue on its own behalf. Consider how these factors were applied in the following cases:

BARROWS v. JACKSON, 346 U.S. 249 (1953): Barrows, a white person who had signed a racially restrictive covenant, was sued for breach of contract for allowing nonwhites to occupy the property. As a defense, Barrows raised the rights of blacks, who were not parties to the lawsuit, to be free from discrimination. The Court allowed third-party standing, permitting the white defendant to raise the interests of blacks to rent and own property in the community. The Court stated that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Because blacks were not parties to the covenant, they had no legal basis for participating in the breach of contract suit. (The suit occurred before open housing laws were enacted that would have allowed African Americans to challenge the covenants as impermissible discrimination.)

CRAIG v. BOREN, 429 U.S. 190 (1976): Oklahoma law permitted women to buy 3.2 percent beer at age 18, but said that men could not do so until age 21.[27] A bartender challenged the law on behalf of male customers between the ages of 18 and 21. The bartender suffered economic loss from the law, thus fulfilling the injury requirement. The Court allowed the bartender standing to assert the rights of his customers and explained "that vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function."

GILMORE v. UTAH, 429 U.S. 1012 (1976): Gary Gilmore was sentenced to death in the state of Utah but chose not to pursue habeas corpus relief in federal court. His mother sued for a stay of execution on his behalf. In a five-to-four decision, the Court refused to hear his mother's claim. The Court's *per curiam* opinion said that the defendant had waived his rights by not pursuing them.

Chief Justice Burger, in a concurring opinion, said that the mother should be denied standing: "When the record establishing a knowing and intelligent waiver of Gary Mark Gilmore's right to seek appellate review is combined with the December 8 written response submitted to this Court, it is plain that the Court is without jurisdiction to entertain the 'next friend' application filed by Bessie Gilmore. This Court has jurisdiction pursuant to Art. III of the Constitution only over 'cases and controversies,' and we can issue stays only in aid of our jurisdiction. There is no dispute, presently before us, between Gary Mark Gilmore and the State of Utah, and the application of Bessie Gilmore manifestly fails to meet the statutory requirements to invoke this

Court's power to review the action of the Supreme Court of Utah. No authority to the contrary has been brought to our attention, and nothing suggested in dissent bears on the threshold question of jurisdiction."

In 2004, the Court returned to the issue of third-party standing in a high-profile case concerning whether the words "under God" in the Pledge of Allegiance are constitutional. The Court dismissed the case on standing grounds. In Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), the Court held that a father lacked standing to sue on behalf of his daughter because he lacked legal custody for the girl and the mother who had legal custody did not want to sue. Justice Stevens wrote, "In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court." Yet why is Newdow's ability to sue based on who has custody of the girl? Does he not have a claim that his own right to control the religious upbringing of his daughter is infringed by the requirement of "under God" in the Pledge of Allegiance?

THE PROHIBITION OF GENERALIZED GRIEVANCES

The prohibition against generalized grievances prevents individuals from suing if their only injury is as a citizen or a taxpayer concerned with having the government follow the law. The Court has said that the prohibition against generalized grievances is a "prudential principle" preventing standing "when the asserted harm is a generalized grievance shared in a substantially equal measure by all or a large class of citizens."[28] In other cases, the Court has suggested that it is a constitutional limitation. In understanding and appraising the prohibition of generalized grievances, consider the following major case, which articulated and applied the rule.

UNITED STATES v. RICHARDSON

418 U.S. 166 (1974)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act of 1949, violate Art. I, §9, cl. 7, of the Constitution which provides:

> 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.

In Frothingham v. Mellon (1923), the plaintiff sought to enjoin enforcement of the Federal Maternity Act of 1921, which provided for financial grants to States with programs for reducing maternal and infant mortality. She alleged violation of the Fifth Amendment's Due Process Clause on the ground that the legislation encroached on an area reserved to the States. In *Frothingham*, the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complainant's future federal income taxes. Denying standing, the *Frothingham* Court rested on the "comparatively minute[,] remote, fluctuating and uncertain," impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

In Flast v. Cohen (1968), this Court explained: "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions." The Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the Taxing and Spending Clause of Art. I, §8, of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power. While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," had been slightly lowered, the Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."

The mere recital of the respondent's claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the *Frothingham* holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA, specifically 50 U.S.C. §403j(b). That section provides different accounting and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas.

Respondent makes no claim that appropriated funds are being spent in violation of a "specific constitutional limitation upon the . . . taxing and spending power. . . ." Rather, he asks the courts to compel the Government to give him information on precisely how the CIA spends its funds. Thus there is no "logical nexus" between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency. The question presented thus is simply and narrowly whether these claims meet the standards for taxpayer standing set forth in *Flast*; we hold they do not. Respondent is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."

The respondent's claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.

This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and "common to all members of the public." While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer,

he is in danger of suffering any particular concrete injury as a result of the operation of this statute.

Ex parte Levitt is especially instructive. There Levitt sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. Levitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, §6, cl. 2, of the Constitution. The Court disposed of Levitt's claim, stating: "'It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.'"

Of course, if Levitt's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Levitt's injury, it was one he shared with "all members of the public."

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

Justice STEWART, with whom Justice MARSHALL joins, dissenting.

The Court's decisions in Flast v. Cohen (1968), and Frothingham v. Mellon (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, §9, cl. 7, of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money." In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this litigation. Those questions are not now before us, but I think that the Court is quite wrong in holding that the respondent was without standing to raise them in the trial court.

Seeking a determination that the Government owes him a duty to supply the information he has requested, the respondent is in the position of a traditional Hohfeldian plaintiff. He contends that the Statement and Account Clause gives him a right to receive the information and burdens the Government with a correlative duty to supply it. Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence vel non of this duty once he shows that the defendant has declined to honor his claim. If the duty in question involved the payment of a sum of money, I suppose that all would agree that a plaintiff asserting the duty would have standing to litigate the issue of his entitlement to the money upon a showing that he had not been paid. I see no reason for a different result when the defendant is a Government official and the asserted duty relates not to the payment of money, but to the disclosure of items of information.

In a companion case, decided the same day, Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), the Court also denied citizen and taxpayer standing. The plaintiffs sued to enjoin members of Congress from serving in the military reserves. Article 1, §6 of the Constitution prevents a senator or representative from holding civil office. As in *Richardson*, standing was denied because the plaintiff alleged injury only as a citizen or taxpayer with an interest in having the government follow the law and not a violation of a specific constitutional right. The Court stated: "Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens. . . . Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

In both *Richardson* and *Schlesinger*, the Court recognizes that denying taxpayer and citizen standing likely will mean that no one could bring a lawsuit challenging the allegedly unconstitutional conduct. The crucial issue, then, is whether it is desirable that some constitutional provisions be left entirely to the political branches for their interpretation and enforcement. On the one hand, the Court's majority argues that the absence of judicial review confirms that these are matters best left to the political process. On the other hand, critics argue that it is essential that the judiciary be available to enforce all of the Constitution or it can be effectively rendered a nullity. The same issue, with the same competing views, arises below in connection with the political question doctrine.

The Supreme Court has recognized only one exception where taxpayer standing is permitted: to challenge government expenditures as violating the Establishment Clause of the First Amendment, the provision that prohibits Congress from making any law respecting the establishment of religion. The key case is Flast v. Cohen, discussed in *Richardson* and presented below:

FLAST v. COHEN

392 U.S. 83 (1968)

Chief Justice WARREN delivered the opinion of the Court.

In Frothingham v. Mellon (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an

impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

Appellants filed suit in the United States District Court for the Southern District of New York to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. The complaint alleged that the seven appellants had as a common attribute that "each pay[s] income taxes of the United States," and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers. The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment.

The question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," and whether the dispute touches upon "the legal relations of parties having adverse legal interests." A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer qua taxpayer consistent with the constitutional limitations of Article III.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, §8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that

the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, §8.

Mr. Justice HARLAN, dissenting.

The Court's analysis consists principally of the observation that the requirements of standing are met if a taxpayer has the "requisite personal stake in the outcome" of this suit. This does not, of course, resolve the standing problem; it merely restates it. The Court implements this standard with the declaration that taxpayers will be "deemed" to have the necessary personal interest if their suits satisfy two criteria: first, the challenged expenditure must form part of a federal spending program, and not merely be "incidental" to a regulatory program; and second, the constitutional provision under which the plaintiff claims must be a "specific limitation" upon Congress' spending powers. The difficulties with these criteria are many and severe, but it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit. As even a cursory examination of the criteria will show, the Court's standard for the determination of standing and its criteria for the satisfaction of that standard are entirely unrelated.

It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory" program. An example will illustrate the point. Assume that two independent federal programs are authorized by Congress, that the first is designed to encourage a specified religious group by the provision to it of direct grants-in-aid, and that the second is designed to discourage all other religious groups by the imposition of various forms of discriminatory regulation. Equal amounts are appropriated by Congress for the two programs. If a taxpayer challenges their constitutionality in separate suits, are we to suppose, as evidently does the Court, that his "personal stake" in the suit involving the second is necessarily smaller than it is in the suit involving the first, and that he should therefore have standing in one but not the other?

The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary.

Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation of this Court into the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention. I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions" of the Constitution's several commands, but neither can I suppose that such power resides only in the federal courts. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.

Flast never has been overruled: Taxpayers have standing to challenge government expenditures as violating the Establishment Clause. But *Flast* also never has been extended. Even in the context of the Establishment Clause, the Supreme Court has refused to extend *Flast* beyond challenges to expenditures. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the Court held that taxpayers lacked standing to challenge the federal government's decision to grant property or its power to dispose of property under Article IV, §3. The Court held that taxpayers have standing only to challenge *expenditures* under Congress's Article I, §8 spending power as violating the Establishment Clause.

In Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007), the Court further limited Flast v. Cohen and held that taxpayers lacked standing to challenge expenditures from general executive revenue as violating the Establishment Clause. President George W. Bush created the Faith-Based and Community Initiatives program to allow faith-based programs, such as churches, synagogues, and mosques, to receive federal funds. A challenge was brought to conferences and speeches that were done in conjunction with the program. The Court noted that "Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations."

The Court denied standing. Justice Alito wrote a plurality opinion joined by Chief Justice Roberts and Justice Kennedy and said that *Flast* v. Cohen was distinguishable: "The expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation. . . . The . . . link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action. We have never found taxpayer standing under such circumstances."

Justices Scalia and Thomas concurred in the judgment and would have overruled Flast v. Cohen: "If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen* (1968) should be applied to (at a minimum) all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing."

Justice Souter wrote a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer and would have allowed standing under Flast v. Cohen. Justice Souter wrote, "[T]he controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent, and respectfully dissent. . . . Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion. The taxpayers therefore seek not to "extend" *Flast*, but merely to apply it. When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury."

Finally, most recently in Arizona School Tuition Organization v. Winn, 563 U.S. 125 (2011), the Court ruled five to four that taxpayers lacked standing to challenge an Arizona law that allowed taxpayers to obtain tax credits tax of up to $500 per person and $1,000 per married couple for contributions to school tuition organizations (STOs). The record demonstrated that the vast majority of funds from these STOs went to religious schools. Justice Kennedy, in an opinion joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, distinguished Flast v. Cohen and said that there is a difference between government expenditures and tax credits, even when both benefit religion:

> The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. Arizona's §43-1089 does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an establishment, or "'force a citizen to contribute three pence only of his property'" to a sectarian organization. On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit. The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception. Finding standing under these circumstances would be more than the extension of *Flast* "to the limits of its logic." It would be a departure from *Flast*'s stated rationale.

Justice Kagan wrote for the four dissenters and argued that there is no meaningful difference between government expenditures that assist religion and tax credits that do so. She wrote:

> Since its inception, the Arizona private-school-tuition tax credit has cost the State, by its own estimate, nearly $350 million in diverted tax revenue. . . . Beginning in *Flast v.*

Cohen (1968), and continuing in case after case for over four decades, this Court and others have exercised jurisdiction to decide taxpayer-initiated challenges not materially different from this one. Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. These litigants lack standing, the majority holds, because the funding of religion they challenge comes from a tax credit, rather than an appropriation. A tax credit, the Court asserts, does not injure objecting taxpayers, because it "does not extract and spend [their] funds in service of an establishment.

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy. Precisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other. Today's opinion thus enables the government to end-run *Flast* 's guarantee of access to the Judiciary. From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion.

Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong. The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State's exercise of its taxing and spending power complies with the Constitution.

c. Ripeness

The third major justiciability doctrine is ripeness. Ripeness, like mootness (discussed in the next section), is a justiciability doctrine determining when review is appropriate. While standing is concerned with who is a proper party to litigate a particular matter, ripeness and mootness determine when that litigation may occur. Specifically, the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.

There is an obvious overlap with the injury requirement in the standing doctrine. In order to have standing, the plaintiff must demonstrate that an injury has occurred or imminently will occur. In order for the case to be ripe, the plaintiff must show that review is not premature; that is, the plaintiff must demonstrate that a harm has occurred or imminently will occur.

To the extent that the substantive requirements overlap and the result will be the same regardless of whether the issue is characterized as ripeness or standing, little turns on the choice of the label. Ripeness, though, usually is used to ask a more specific question: When may a party seek pre-enforcement review of a statute or regulation? Customarily, a person can challenge the legality of a statute or regulation when he or she is prosecuted for violating it. There is an unfairness, however, to requiring a person to violate a law in order to challenge it. A person might unnecessarily obey an unconstitutional law, refraining from the prohibited conduct, rather than risk criminal punishments. Alternatively, a person might violate a statute or regulation, confident that it will be invalidated, only to be punished when the law is upheld. A primary purpose of the Declaratory Judgment Act was to permit people to avoid this choice and obtain pre-enforcement review of statutes and regulations. Ripeness, then, is best understood as the determination of whether a federal court can grant pre-enforcement review; for example, when may a court hear a request for a declaratory judgment, or when must it decline review?

In evaluating ripeness, consider the following case in which the Court denied review by finding that the challenge was not ripe for review.

POE v. ULLMAN

367 U.S. 497 (1961)

Mr. Justice FRANKFURTER announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice CLARK and Mr. Justice WHITTAKER join.

These appeals challenge the constitutionality, under the Fourteenth Amendment, of Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse.

No. 60 combines two actions brought in a Connecticut Superior Court for declaratory relief. The complaint in the first alleges that the plaintiffs, Paul and Pauline Poe, are a husband and wife, thirty and twenty-six years old respectively, who live together and have no children. Mrs. Poe has had three consecutive pregnancies terminating in infants with multiple congenital abnormalities from which each died shortly after birth. Plaintiffs have consulted Dr. Buxton, an obstetrician and gynecologist of eminence, and it is Dr. Buxton's opinion that the cause of the infants' abnormalities is genetic, although the underlying "mechanism" is unclear. In view of the great emotional stress already suffered by plaintiffs, the probable consequence of another pregnancy is psychological strain extremely disturbing to the physical and mental health of both husband and wife. Plaintiffs know that it is Dr. Buxton's opinion that the best and safest medical treatment which could be prescribed for their situation is advice in methods of preventing conception. Dr. Buxton knows of drugs, medicinal articles and instruments which can be safely used to effect contraception. Medically, the use of these devices is indicated as the best and safest preventive measure necessary for the protection of plaintiffs' health. Plaintiffs, however, have been unable to obtain this information for the sole reason that its delivery and use may or will be claimed by the defendant State's Attorney (appellee in this Court) to constitute offenses against Connecticut law.

The second action in No. 60 is brought by Jane Doe, a twenty-five-year-old housewife. Mrs. Doe, it is alleged, lives with her husband, they have no children; Mrs. Doe recently underwent a pregnancy which induced in her a critical physical illness—two weeks' unconsciousness and a total of nine weeks' acute sickness which left her with partial paralysis, marked impairment of speech, and emotional instability. Another pregnancy would be exceedingly perilous to her life. She, too, has consulted Dr. Buxton, who believes that the best and safest treatment for her is contraceptive advice.

In No. 61, also a declaratory judgment action, Dr. Buxton is the plaintiff. Setting forth facts identical to those alleged by Jane Doe, he asks that the Connecticut statutes prohibiting his giving of contraceptive advice to Mrs. Doe be adjudged unconstitutional, as depriving him of liberty and property without due process.

The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in State v. Nelson. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the Act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Errors sustained the legislation on appeal from a demurrer to the information, the State moved to dismiss the information. Neither counsel nor our own researchers have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed.

Insofar as appellants seek to justify the exercise of our declaratory power by the threat of prosecution, facts which they can no more negative by complaint and demurrer than they could by stipulation preclude our determining their appeals on the merits. It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.

Justice DOUGLAS, dissenting.

If there is a case where the need for this remedy in the shadow of a criminal prosecution is shown, it is this one. Plaintiffs in No. 60 are two sets of husband and wife. One wife is pathetically ill, having delivered a stillborn fetus. If she becomes pregnant again, her life will be gravely jeopardized. This couple have been unable to get medical advice concerning the "best and safest" means to avoid pregnancy from their physician, plaintiff in No. 61, because if he gave it he would commit a crime. The use of contraceptive devices would also constitute a

crime. And it is alleged—and admitted by the State—that the State's Attorney intends to enforce the law by prosecuting offenses under the laws.

A public clinic dispensing birth-control information has indeed been closed by the State. Doctors and a nurse working in that clinic were arrested by the police and charged with advising married women on the use of contraceptives. That litigation produced State v. Nelson, which upheld these statutes. That same police raid on the clinic resulted in the seizure of a quantity of the clinic's contraception literature and medical equipment and supplies.

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. They are entitled to an answer to their predicament here and now.

The Connecticut law was subsequently declared unconstitutional five years later in Griswold v. Connecticut, 381 U.S. 479 (1965). The director of a Planned Parenthood clinic and Dr. Buxton openly violated the Connecticut law and were prosecuted. As a defense, they challenged the constitutionality of the statute. The Court declared the law unconstitutional as violating the right to privacy. *Griswold* is presented in Chapter 8 in connection with the discussion of privacy and reproductive autonomy. The underlying question is whether waiting for an actual prosecution was appropriate restraint by the Supreme Court or whether it was undesirable avoidance of an important constitutional issue.

Although Poe v. Ullman discusses ripeness, it does not articulate any clear criteria for courts to use in evaluating whether a case is ripe. The following case, Abbott Laboratories v. Gardner, announces criteria that often have been used in evaluating ripeness.

ABBOTT LABORATORIES v. GARDNER

387 U.S. 136 (1967)

Mr. Justice HARLAN delivered the opinion of the Court.

In 1962 Congress amended the Federal Food, Drug, and Cosmetic Act, to require manufacturers of prescription drugs to print the "established name" of the drug "prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug," on labels and other printed material. The "established name" is one designated by the Secretary of Health, Education, and Welfare; the "proprietary name" is usually a trade name under which a particular drug is marketed. The underlying purpose of the 1962 amendment was to bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their "established" or less familiar trade names at significantly lower prices.

The present action was brought by a group of 37 individual drug manufacturers and by the Pharmaceutical Manufacturers Association, of which all the petitioner companies are members, and which includes manufacturers of more than 90% of the Nation's supply of prescription drugs. They challenged the regulations on the ground that the Commissioner exceeded his authority under the statute by promulgating an order requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material.

The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

As to the former factor, we believe the issues presented are appropriate for judicial resolution at this time. [A]ll parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed.

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.

In light of the criteria articulated in Abbott Laboratories v. Gardner, consider the following cases and whether the claim should have been deemed ripe for review.

UNITED PUBLIC WORKERS v. MITCHELL, 330 U.S. 75 (1947): A lawsuit was filed challenging the constitutionality of the Hatch Act of 1940, which prevented federal employees from taking "any active part in political management or political campaigns." The plaintiffs sought a declaratory judgment that the law violated their First Amendment rights and provided detailed affidavits listing the activities they wished to engage in. The Court found their claims to be not ripe. The Court said that the plaintiffs "seem clearly to seek advisory opinions upon broad claims. . . . A hypothetical threat is not enough. We can only speculate as to the kinds of political

activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication."[29]

REGIONAL RAIL REORGANIZATION ACT CASES, 419 U.S. 102 (1974): Eight major railroads brought a lawsuit challenging the conveyance of their property to Conrail. The district court found the case not justiciable on ripeness grounds because the reorganization plan had not yet been formulated and a special court had not yet ordered the reconveyances. But the Supreme Court held that the case was ripe, concluding, "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."

LAKE CARRIERS ASSN. v. MacMULLAN, 406 U.S. 498 (1972): A state law prohibited discharge of sewage from boats. Plaintiffs challenged the statute's validity. State officials had announced that they would not enforce the law until land-based pumpout facilities would be available, a construction process that would take a substantial amount of time. Although enforcement was many years in the future, the Court found that the suit was ripe because it was inevitable that the law would be enforced and that as a result the boat owners had to begin installing new facilities on their boats in anticipation of the time when the law was implemented.

SUSAN B. ANTHONY LIST v. DRIEHAUS, 573 U.S. 149 (2014): The Court considered whether a group had standing to challenge an Ohio statute that prohibits "false statements" during the course of a political campaign. The Court explained that the "question in this case is whether their preenforcement challenge to that law is justiciable—and in particular, whether they have alleged a sufficiently imminent injury for the purposes of Article III." A member of Congress initiated proceedings against the Susan B. Anthony List in the Ohio Elections Commission, which found probable cause to proceed, but the matter was dismissed after the Congressman lost his reelection bid. The Susan B. Anthony List had brought a challenge to the Ohio law in federal court, and the issue before the Supreme Court was whether its challenge to the Ohio law could continue after the Ohio Elections Commission proceedings were dismissed.

The Supreme Court ruled unanimously in favor of the Susan B. Anthony List and found that the matter was justiciable. Justice Thomas, writing for a unanimous Court, noted that "[w]hen an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." The Court found that the matter was ripe for review because the plaintiffs "have alleged a credible threat of enforcement." The Court stressed that "the threat of future enforcement of the false statement statute is substantial."

d. Mootness

A plaintiff must present a live controversy at all stages of federal court litigation. If anything occurs while a lawsuit is pending to end the plaintiff's injury, the case is to be dismissed as moot. For example, a case is moot if a criminal defendant dies during the appeals process or if a civil plaintiff dies where the cause of action does not survive death.[30] Also, if the parties settle the matter, a live controversy obviously no longer exists.[31] If a challenged law is repealed or expires, the case is moot.

The Supreme Court frequently has explained that the mootness doctrine is derived from Article III's prohibition against federal courts issuing advisory opinions.[32] If a case is moot, there no longer is an actual controversy between adverse litigants. Also, if events subsequent to the

initiation of the lawsuit have resolved the matter, then a federal court decision is not likely to have any effect.

The Supreme Court has applied the mootness doctrine in a less strict manner than other justiciability doctrines, such as standing. Indeed, the Court has spoken of "the flexible character of the Article III mootness doctrine."[33] This flexibility is manifested in three exceptions to the mootness doctrine.[34]

One exception to the mootness doctrine is for "wrongs capable of repetition but evading review." Some injuries are of such short duration that inevitably they are over before the federal court proceedings are completed. A case is not dismissed, even though it is moot, if there is an injury likely to recur in the future and it is possible that it could happen to the plaintiff again, and it is of such a short duration that it likely always will evade review. Consider and compare the following three cases that discussed this exception to the mootness doctrine:

MOORE v. OGILVIE, 394 U.S. 814 (1969): Illinois law required that a petition to nominate candidates for the general election for a new political party be signed by at least 25,000 qualified voters, including 200 qualified voters from each of at least 50 counties. In 1968, the plaintiffs filed petitions for inclusion on the ballot but were denied this because they did not meet the requirement for the number of signatures in each county. They immediately filed suit, but, of course, the election was over by the time the Supreme Court heard the case.

The Court said, "[Defendants] urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore 'capable of repetition, yet evading review.' The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust."

ROE v. WADE, 410 U.S. 113 (1973): Roe was a pregnant woman in Texas who filed a lawsuit seeking a declaratory judgment that the Texas law prohibiting abortion was unconstitutional and an injunction restraining the defendant from enforcing the law. At the time she filed her suit in 1970, she alleged that she was in the first trimester of her pregnancy and seeking an abortion. Obviously, when the Supreme Court decided her case in 1973, she was no longer pregnant. The defendant moved to dismiss on mootness grounds.[35]

The Court stated, "Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated.

"But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law

should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." p. 87

DeFUNIS v. ODEGAARD, 416 U.S. 312 (1974): Marco DeFunis, a white male, was denied admission to the University of Washington Law School. He filed suit challenging his denial of admission on the ground that the university's affirmative action program denied him equal protection. The case was not filed as a class action suit. He received a preliminary injunction and was allowed to attend law school while the suit was pending. By the time the case reached the Supreme Court, DeFunis was a third-year law student. The university stated that he would be allowed to finish school no matter what the Court's ruling.

The Court explained, "The starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'

"It might be suggested that this case presents a question that is 'capable of repetition, yet evading review,' and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gauntlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from Law School, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the doctrine might permit a departure from '[t]he usual rule in federal cases . . . that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated.'

"Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties."

A second major exception to the mootness doctrine is for voluntary cessation. A case is not to be dismissed as moot if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time. Only if there is no reasonable chance that the defendant could resume the offending behavior is a case deemed moot on the basis of voluntary cessation. Consider the following recent case, which applied this exception. p. 88

FRIENDS OF THE EARTH, INC. v. LAIDLAW ENVIRONMENTAL SERVICES

528 U.S. 167 (2000)

[Environmental groups brought a lawsuit pursuant to a citizen suit provision of Clean Water Act (CWA) against the holder of a National Pollutant Discharge Elimination System (NPDES) permit, alleging that it was violating mercury discharge limits. The plaintiffs sought declaratory and injunctive relief, civil penalties, costs, and attorney fees.]

Justice GINSBURG delivered the opinion of the Court.

The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct —either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. Laidlaw also asserts that the closure of its Roebuck facility, which took place after the Court of Appeals issued its decision, mooted the case. The facility closure, like Laidlaw's earlier achievement of substantial compliance with its permit requirements, might moot the case, but—we once more reiterate—only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur. The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter. FOE points out, for example—and Laidlaw does not appear to contest —that Laidlaw retains its NPDES permit. These issues have not been aired in the lower courts; they remain open for consideration on remand.

The third and final exception to the mootness doctrine is for class action suits. The Supreme Court has held that a properly certified class action suit may continue even if the named plaintiff's claims are rendered moot. The Court has reasoned that the "class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the plaintiff]," and thus as long as the members of the class have a live controversy the case can continue.[36] The following case describes and applies this exception.

UNITED STATES PAROLE COMMISSION v. GERAGHTY

445 U.S. 388 (1980)

[A federal prisoner, after twice being denied parole from a federal prison, brought suit challenging the validity of the U.S. Parole Commission's Parole Release Guidelines. The district

court denied respondent's request for certification of the suit as a class action on behalf of a class of "all federal prisoners who are or who will become eligible for release on parole," and granted summary judgment for petitioners on the merits. Respondent was released from prison while his appeal to the court of appeals was pending.]

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot."

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court.

On several occasions the Court has considered the application of the "personal stake" requirement in the class-action context. In Sosna v. Iowa (1975), it held that mootness of the named plaintiff's individual claim after a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. E.g., Franks v. Bowman Transportation Co. (1976). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.

These cases demonstrate the flexible character of the Art. III mootness doctrine. As has been noted in the past, Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." "[T]he justiciability doctrine [is] one of uncertain and shifting contours."

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue. In Sosna v. Iowa it was recognized that a named plaintiff whose claim on the merits expires after class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been

denied. The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

e. The Political Question Doctrine

i. *The Political Question Doctrine Defined*

The political question doctrine refers to allegations of constitutional violations that federal courts will not adjudicate, and that the Supreme Court deems to be inappropriate for judicial review. The Court has held that some constitutional provisions are left to the political branches of government to interpret and enforce. Although there is an allegation that the Constitution has been violated, cases brought under these provisions are dismissed as nonjusticiable political questions.

The underlying question is whether there should be a political question doctrine. Critics of the political question doctrine argue that it is wrong to leave some constitutional provisions solely to the political branches to interpret and enforce.[37] The argument is that the Constitution is meant to insulate matters from the political process and therefore it is wrong to leave constitutional provisions to the elected branches of government to interpret and enforce.

But the political question doctrine is defended on separation of powers grounds; the Constitution is seen as assigning certain provisions to the other branches of government. Moreover, defenders of the political question doctrine argue that it minimizes judicial intrusion into the operations of the other branches of government and that it allocates decisions to the branches of government that have superior expertise in particular areas. For example, some argue that the Court rightly has treated many constitutional issues concerning foreign policy to be political questions because of the greater information and expertise of the other branches of government.[38]

WHAT IS A POLITICAL QUESTION? THE ISSUES OF MALAPPORTIONMENT AND PARTISAN GERRYMANDERING

The Supreme Court has applied the political question doctrine almost throughout American history. Baker v. Carr, below, is the most famous articulation of the criteria for determining what is a political question. *Baker* involves the question of whether an equal protection challenge to malapportionment of state legislatures is a nonjusticiable political question. To understand *Baker*, it is important to know that the Court rejected an earlier challenge to malapportionment based on the "Guaranty Clause." This clause is found in Article IV, §4 of the Constitution: "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." In Colegrove v. Green, in 1946, the Court held that challenges to malapportionment under this provision are a nonjusticiable political question.[39]

Indeed, the Supreme Court long has refused to find cases under the Guaranty Clause justiciable. In Luther v. Borden, in 1849, the Court refused to hear a challenge to the Rhode Island government under the Guaranty Clause[40] after the voters of Rhode Island adopted a new

state constitution, in part in response to significant malapportionment in the state legislature. After this enactment, the existing government, which was sure to lose power under the new document, enacted a law prohibiting the constitution from going into effect. Nonetheless, elections were held—even though the existing government had declared voting in them to be a crime. Relatively few people participated, but a new government was chosen, led by Thomas Dorr, who was elected governor. Dorr's government met for two days in an abandoned foundry and then disbanded.

In April 1842, a sheriff, L. Borden, broke into the house of one of the election commissioners, Martin Luther, to search for evidence of illegal participation in the prohibited election. Luther sued Borden for trespass. Borden claimed that the search was a lawful exercise of government power. Luther, however, contended that Borden acted pursuant to an unconstitutional government's orders; he maintained that the Rhode Island government violated the Republican Form of Government Clause.

The Supreme Court held that the case posed a political question that could not be decided by a federal court. The Court stated: "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." The Court also explained that the case posed a political question because if the state's government was declared unconstitutional, then all of its actions would be invalidated, creating chaos in Rhode Island.

The Supreme Court never has varied from this holding: Cases under the Guaranty Clause are nonjusticiable. Colegrove v. Green followed this in refusing to adjudicate a challenge to malapportionment under the Guaranty Clause. The issue in Baker v. Carr is whether the same challenge is justiciable when brought under equal protection. As you read Baker v. Carr, compare the views of the majority and dissenting opinions as to the appropriate role of the judiciary.

BAKER v. CARR

369 U.S. 186 (1962)

Justice BRENNAN delivered the opinion of the Court.

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

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. [I]n the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

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

[After describing the cases under the Guaranty Clause, the Court explained:] But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought "political," can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization.

Since, as has been established, the equal protection claim tendered in this case does not require decision of any political question, and since the presence of a matter affecting state government does not render the case nonjusticiable, [w]e conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

Justice FRANKFURTER, whom Mr. Justice HARLAN joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The

impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme.

Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.

In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make in terrorem pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. Certainly, "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form."

Subsequently, the Court held that apportionment must meet the standard of one person, one vote; that is, all districts must be approximately equal in population size.[41] These cases are discussed in Chapter 8.

The Court also had occasion to consider justiciability in the election context in deciding whether challenges to political gerrymandering constitute a political question. In Davis v. Bandemer, the plaintiffs contended that the Republican-controlled Indiana legislature gerrymandered the drawing of election districts to maximize the election of Republican representatives.[42] The Supreme Court held that the claim was justiciable. The Court explained that "the standards that we set forth here for adjudicating this political gerrymandering claim are [no] less manageable than the standards that have been developed for racial gerrymandering claims." Accordingly, the Court held that "political gerrymandering cases are properly justiciable under the Equal Protection Clause."

In 2004, in Vieth v. Jublierer, 541 U.S. 267 (2004), the Court held, 5-4, that challenges to partisan gerrymandering are non-justiciable political questions. Justice Scalia wrote the plurality opinion, joined by three other justices, saying that there are not judicially discoverable or manageable standards for when gerrymandering violates the Constitution. Justice Kennedy, the fifth justice in the majority, wrote separately to say that there weren't standards at that time, but left open the possibility of standards in the future.

In 2019, in Rucho v. Common Cause, the Court held, 5-4, that no such standards exist and that therefore challenges to partisan gerrymandering are non-justiciable political questions.

RUCHO v. COMMON CAUSE

139 S. Ct. 2484 (2019)

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.

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. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, "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." He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." One Democratic state senator objected that entrenching the 10-3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

The second case before us is Lamone v. Benisek. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

II

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'"

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]."

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength."

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, §4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.

The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress.

Courts have nevertheless 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.

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."

III

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." An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." And it 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." If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering."

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."

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."

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. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects.

Unable to claim that the Constitution requires proportional representation outright, 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."

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.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not."

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. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

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 districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

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? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," and "results from one gerrymandering case to the next would likely be disparate and inconsistent."

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.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters.

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." 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.

IV

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.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district. The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." The First Amendment test simply

describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

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?)." 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.

The District Court asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, §2, "namely, that the voters should choose their representatives, not the other way around." That seems like an objection more properly grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," 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. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.

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. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can't do the same. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. Indeed, numerous other States are restricting partisan considerations in districting through legislation. 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.

As noted, the 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. Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. 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.

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." In this rare circumstance, that means our duty is to say "this is not law."

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice 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. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of

polarization and dysfunction. 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.

I

A

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

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. [After a federal court order, new districts were drawn and the person responsible declared:] "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. In 2016, Republican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

B

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. "Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people."

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people."

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. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles."

And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem —a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. 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. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grand-father's—let alone the Framers'—gerrymanders.

C

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. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. 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. 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." Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[ ]."

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." And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness.

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.

II

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. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." 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?'" No "discernible and manageable" standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan.

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.

Start with the standard the lower courts used. Both courts focused on the harm of vote dilution. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that 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.

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."

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.

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. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10-3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. 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.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. One was "introduced in 2005 and has been reintroduced in every Congress since." And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail.

The majority's most perplexing "solution" is to look to state courts. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is."

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.

The political question doctrine is best understood by considering areas where it has been applied. In addition to the election cases described above, below are presented three of the more important areas where it has been applied: (1) challenges to restrictions on congressional membership—where the political question doctrine was rejected, (2) challenges to the president's conduct of foreign policy, and (3) challenges to the impeachment process—where the political question doctrine was applied. As you read these cases, consider whether these constitutional provisions and constitutional controversies are best deemed nonjusticiable political questions or whether they should have been decided on the merits by the courts.

ii. *The Political Question Doctrine Applied: Congressional Self-Governance*

POWELL v. MCCORMACK

395 U.S. 486 (1969)

Chief Justice WARREN delivered the opinion of the Court.

In November 1966, petitioner Adam Clayton Powell, Jr., was duly elected from the 18th Congressional District of New York to serve in the United States House of Representatives for the 90th Congress. However, pursuant to a House resolution, he was not permitted to take his seat. Powell (and some of the voters of his district) then filed suit in Federal District Court, claiming that the House could exclude him only if it found he failed to meet the standing requirements of age, citizenship, and residence contained in Art. I, §2, of the Constitution—requirements the House specifically found Powell met—and thus had excluded him unconstitutionally.

During the 89th Congress, a Special Subcommittee on Contracts of the Committee on House Administration conducted an investigation into the expenditures of the Committee on Education and Labor, of which petitioner Adam Clayton Powell, Jr., was chairman. The Special Subcommittee issued a report concluding that Powell and certain staff employees had deceived the House authorities as to travel expenses. The report also indicated there was strong evidence that certain illegal salary payments had been made to Powell's wife at his direction. No formal action was taken during the 89th Congress. However, prior to the organization of the 90th Congress, the Democratic members-elect met in caucus and voted to remove Powell as chairman of the Committee on Education and Labor.

When the 90th Congress met to organize in January 1967, Powell was asked to step aside while the oath was administered to the other members-elect. [After a Committee investigation and report, the House voted to exclude Powell and directed that the Speaker notify the Governor of New York that the seat was vacant.]

[W]e turn to the question whether the case is justiciable.

Respondents' first contention is that this case presents a political question because under Art. I, §5, there has been a "textually demonstrable constitutional commitment" to the House of the "adjudicatory power" to determine Powell's qualifications. Thus it is argued that the House, and the House alone, has power to determine who is qualified to be a member.

In order to determine whether there has been a textual commitment to a coordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, §5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. Respondents maintain that the House has broad power under §5, and, they argue, the House may determine which are the qualifications necessary for membership. On the other hand, petitioners allege that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution.

In order to determine the scope of any "textual commitment" under Art. I, §5, we necessarily must determine the meaning of the phrase to "be the Judge of the Qualifications of its own Members." Petitioners argue that the records of the debates during the Constitutional Convention; available commentary from the post-Convention, pre-ratification period; and early congressional applications of Art. I, §5, support their construction of the section. Our examination of the relevant historical materials leads us to the conclusion that petitioners are

correct and that the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.

[After reviewing English history, debates at the Constitutional Convention, and subsequent practices, the Court concluded:] Had the intent of the framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress's own post–Civil War exclusion cases, against "vesting an improper & dangerous power in the Legislature." Moreover, it would effectively nullify the Convention's decision to require a two-thirds vote for expulsion. Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

For these reasons, we have concluded that Art. I, §5, is at most a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the "textual commitment" formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims.

iii. *The Political Question Doctrine Applied: Foreign Policy*

Although the Supreme Court has declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"[43] the Court also frequently has held that cases presenting issues related to the conduct of foreign affairs pose political questions. In Oetjen v. Central Leather Co., in 1918, the Court declared: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislature 'the political' Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[44]

Over the past few decades, there have been several challenges to the president's use of troops in foreign countries. For example, during the Vietnam War, several dozen cases were filed in the federal courts arguing that the war was unconstitutional because there was no congressional declaration of war. Although the Supreme Court did not rule in any of these cases, either as to justiciability or on the merits, most of the lower courts deemed that the challenges to the war do constitute a political question.[45] In the same way, the political question doctrine was used by lower courts to dismiss challenges to the constitutionality of the president's military activities in El Salvador,[46] U.S. involvement in the Persian Gulf War,[47] U.S. participation in the bombing of Yugoslavia in 1999,[48] and the U.S. war in Iraq.[49]

The underlying issue, as with all areas of the political question doctrine, is whether this is appropriate judicial deference or unwarranted judicial abdication on an important constitutional issue. Compare the following two cases, one of which found a matter involving foreign policy to be a political question, while the other rejected this argument.

GOLDWATER v. CARTER

444 U.S. 996 (1979)

[President Jimmy Carter rescinded the United States' treaty with Taiwan as part of recognizing the People's Republic of China. Senator Barry Goldwater brought a constitutional challenge arguing that the Senate must rescind a treaty, just as the Senate must ratify the making of a treaty.]

Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice STEVENS join, concurring in the judgment.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.

[T]he controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty.

In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also "must surely be controlled by political standards."

I think that the justifications for concluding that the question here is political in nature are compelling because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked. Having decided that the question presented in this action is nonjusticiable, I believe that the appropriate disposition is for this Court to vacate the decision of the Court of Appeals and remand with instructions for the District Court to dismiss the complaint.

Justice POWELL, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review. This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a

constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Justice POWELL, [concurring in the judgment and dissenting].

In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, no final vote has been taken on the resolution. Moreover, it is unclear whether the resolution would have retroactive effect. It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.

Justice Rehnquist suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of Baker v. Carr, 369 U.S. 186 (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review.

First, the existence of "a textually demonstrable constitutional commitment of the issue to a coordinate political department," turns on an examination of the constitutional provisions governing the exercise of the power in question. No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, §2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.

Second, there is no "lack of judicially discoverable and manageable standards for resolving" this case; nor is a decision impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. The present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr.

Finally, the political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government. Thus, the Judicial Branch should avoid "the

potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question." Similarly, the doctrine restrains judicial action where there is an "unusual need for unquestioning adherence to a political decision already made."

In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. Under the criteria enunciated in Baker v. Carr, we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

ZIVOTOFSKY v. CLINTON

566 U.S. 189 (2012)

Chief Justice ROBERTS delivered the opinion of the Court.

Congress enacted a statute providing that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports. The State Department declined to follow that law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by an American who invoked the statute, the Secretary of State argued that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals so held.

We disagree. The courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution.

In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine.

The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood Zivotofsky to ask the courts to "decide the political status of Jerusalem." This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under §214(d), to choose to have Israel recorded on his passport as his place of birth.

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of §214(d), the only real question for the courts is whether the statute is constitutional. At least since Marbury v. Madison, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications."

In this case, determining the constitutionality of §214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with §214(d). Either way, the political question doctrine is not implicated. "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts."

Justice BREYER, dissenting.

Four sets of prudential considerations, *taken together*, lead me to the conclusion [that this case poses a political question]:

First, the issue before us arises in the field of foreign affairs. Second, if the courts must answer the constitutional question before us, they may well have to evaluate the foreign policy implications of foreign policy decisions. Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones. Zivotofsky does not assert the kind of interest, *e.g.*, an interest in property or bodily integrity, which courts have traditionally sought to protect. Fourth, insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences. The upshot is that this case is unusual both in its minimal need for judicial intervention and in its more serious risk that intervention will bring about "embarrassment," show lack of "respect" for the other branches, and potentially disrupt sound foreign policy decisionmaking. For these prudential reasons, I would hold that the political-question doctrine bars further judicial consideration of this case.[50]

iv. *The Political Question Doctrine Applied: Impeachment and Removal*

In 1999, the House of Representatives voted articles of impeachment against President Bill Clinton.[51] The question often was raised as to whether any aspects of the impeachment procedure could be subjected to judicial review. The leading Supreme Court case on the subject was decided just six years earlier, and it indicates that the challenges to impeachment and removal are not justiciable.

NIXON v. UNITED STATES

506 U.S. 224 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, §3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison. The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. Because Nixon refused to resign from his office as a United States District Judge, he continued to collect his judicial salary while serving out his prison sentence.

On May 10, 1989, the House of Representatives adopted three articles of impeachment for high crimes and misdemeanors. The first two articles charged Nixon with giving false testimony before the grand jury and the third article charged him with bringing disrepute on the Federal Judiciary.

After the House presented the articles to the Senate, the Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to "receive evidence and take testimony." Senate Impeachment Rule XI. The Senate committee held four days of hearings, during which 10 witnesses, including Nixon, testified. Pursuant to Rule XI, the committee presented the full Senate with a complete transcript of the proceeding and a Report stating the uncontested facts and summarizing the evidence on the contested facts. Nixon and the House impeachment managers submitted extensive final briefs to the full Senate and delivered arguments from the Senate floor during the three hours set aside for oral argument in front of that body. Nixon himself gave a personal appeal, and several Senators posed questions directly to both parties. The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first two articles. The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. See Art. I, §3, cl. 6. Nixon sought a declaratory judgment that his impeachment conviction was void and that his judicial salary and privileges should be reinstated.

In this case, we must examine Art. I, §3, cl. 6, to determine the scope of authority conferred upon the Senate by the framers regarding impeachment. It provides:

> 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.

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate

and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution—with respect to the House of Representatives' "sole Power of Impeachment." Art. I, §2, cl. 5. The common-sense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. If the courts may review the actions of the Senate in order to determine whether that body "tried" an impeached official, it is difficult to see how the Senate would be "functioning . . . independently and without assistance or interference."

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. See Art. I, §3, cl. 7. The framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments. Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature. Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment Trial Clause, there is a grave risk that the Senate will usurp judicial power. The framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that "[a]s the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire."

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside

the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Justice SOUTER, concurring in the judgment.

I agree with the Court that this case presents a nonjusticiable political question. Because my analysis differs somewhat from the Court's, however, I concur in its judgment by this separate opinion.

As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government. One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "a bad guy," judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder."

Notes

1 For excellent, in-depth analysis of Marbury v. Madison, *see* Burt Neuborne, *Madison's Music* (2014); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1.

2 *Dred Scott* is discussed in Chapter 7, which focuses on equal protection.

3 Alexander Bickel, *The Least Dangerous Branch* 18 (1962).

4 Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 6 (1971).

5 *See*, *e.g.*, Raoul Berger, *Ely's Theory of Judicial Review*, 42 Ohio St. L.J. 87, 87 (1981).

6 John Hart Ely, *Democracy and Distrust* 1 (1980).

7 *Id.*

8 District of Columbia v. Heller involved only whether a federal law was unconstitutional. Two years later, in McDonald v. City of Chicago, 561 U.S. 742 (2010), the Court held that the Second Amendment applies to state and local governments. *McDonald*, and more generally the application of the Bill of Rights to state and local governments, is presented in Chapter 5. [Footnote by casebook author.]

9 *See*, *e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

10 S. 3386, 85th Cong., 2d Sess. (1958).

11 Paul Bator, Daniel Meltzer, Paul Mishkin, & David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 377 (3d ed. 1988).

12 *See*, *e.g.*, S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction in abortion cases); S. 481, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayers).

13 H.R. 3313, 108th Cong., 2d Sess. (2004).

14 H.R. 2023, 108th Cong., 2d Sess. (2004).

15 *See*, *e.g.*, Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-1006 (1965).

16 Act of Sept. 24, 1789, 1 Stat. 73; *see* Peter W. Low & John Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 171 (3d ed. 1994).

17 Act of Dec. 23, 1914, 38 Stat. 790.

18 *See* Raoul Berger, *Congress v. The Supreme Court* 285-296 (1969).

19 Flast v. Cohen, 392 U.S. 83, 95 (1968).

20 *Id.*

21 There are other constitutional limits on the federal judicial power in addition to the justiciability doctrines. One of the most important is the Eleventh Amendment which has been interpreted as barring suits against states in federal court by states' own citizens and citizens of other states. The complex body of Eleventh Amendment law generally is covered in Federal Courts classes and not Constitutional Law courses and so is beyond the scope of this book. However, the Court has had occasion to discuss the Eleventh Amendment in considering the scope of Congress's powers under §5 of the Fourteenth Amendment. These cases are presented in Chapter 2. For a discussion of the Eleventh Amendment, *see* Erwin Chemerinsky, *Federal Jurisdiction*, Chapter 7 (7th ed. 2016).

22 297 U.S. 288 (1936). For an excellent discussion of these avoidance principles, *see* Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003 (1994).

23 There is a rich literature on the standing doctrines. *See*, *e.g.*, Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227 (1990); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 223 (1988).

24 The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement." To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law—grants of tax exemptions to racially discriminatory schools in respondents' communities. [Footnote by the Court.]

25 There is a third prudential standing requirement that arises almost exclusively in the administrative law context: the rule that the plaintiff seeking standing must be within the zone of interests protected by the statute in question. This requirement applies when a person is challenging an administrative agency regulation that does not directly control the person's actions. The Supreme Court has stated that the plaintiff must allege that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). In other words, if a plaintiff is suing pursuant to a statutory provision, in order to have standing the plaintiff must be part of the group intended to benefit from the law. Although the Court's statement of the test includes its application to constitutional provisions, the zone of interests requirement is used only in statutory cases, usually involving administrative law issues.

26 Warth v. Seldin, 422 U.S. at 499.

27 The equal protection issues in this case are presented in Chapter 7.

28 Warth v. Seldin, 422 U.S. 490, 499 (1975).

29 In a subsequent case, U.S. Civil Service Commn. v. National Assn. of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973), the Court found a challenge to the Hatch Act to be ripe because the plaintiffs alleged that they desired to engage in specific political activity. The Court held that the Hatch Act does not violate the First Amendment.

30 Dove v. United States, 423 U.S. 325 (1976).

31 *See*, *e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385, 400 (1977) (Powell, J., dissenting) ("The settlement of an individual claim typically moots any issues associated with it."). Settlement must be distinguished from a situation in which the defendant voluntarily agrees to refrain from a practice, but is free to resume it at any time. As discussed below, the latter does not moot the case.

32 *See*, *e.g.*, SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969). *But see* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (arguing that mootness doctrine is primarily prudential and not constitutionally based).

33 U.S. Parole Commn. v. Geraghty, 445 U.S. 388, 400 (1980).

34 Additionally, it should be remembered that a case is not moot if the plaintiff has some ongoing injury, even if other injuries are over. For example, a challenge to a criminal conviction is not moot, even after the defendant has completed the sentence and is released from custody, when the defendant continues to face adverse consequences of the criminal conviction. *See* Sibron v. New York, 392 U.S. 40 (1968). Similarly, a plaintiff seeking both injunctive relief and money damages can continue to pursue the case, even after the request for an equitable remedy is rendered moot. Havens Realty Corp. v. Coleman, 455 U.S. 363, 370-371 (1982) (case not moot because plaintiffs would each be entitled to $400 in liquidated damages if defendants were found liable).

35 The parts of the opinion concerning the Constitution's protection of the right to abortion are discussed in Chapter 8.

36 Sosna v. Iowa, 419 U.S. 393, 399 (1975).

37 *See*, *e.g.*, Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031 (1985).

38 *See*, *e.g.*, Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 567 (1966).

39 328 U.S. 549 (1946).

40 48 U.S. (7 How.) 1 (1849).

41 *See* Reynolds v. Sims, 377 U.S. 533 (1964) (articulating the one-person, one-vote standard).

42 478 U.S. 109 (1986).

43 Baker v. Carr, 369 U.S. 186, 211 (1962).

44 246 U.S. 297, 302 (1918). *See also* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

45 *See*, *e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); DaCasta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972), *cert. denied*, 409 U.S. 929 (1972); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); *see also* Anthony D'Amato & Robert M. O'Neil, *The Judiciary and Vietnam* 51-58 (1972) (description of cases concerning the Vietnam War as a political question); Louis Henkin, *Vietnam in the Courts of the United States: Political Questions*, 63 Am. J. Intl. L. 284 (1969).

46 *See*, *e.g.*, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); *but cf.* Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (holding justiciable a claim by a U.S. citizen that the federal government had taken his property in Honduras for the purpose of using it as a military training site; no challenge to the legality of the military activities was present).

47 *See*, *e.g.*, Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990).

48 Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999).

49 Doe v. Bush, 322 F.3d 109 (1st Cir. 2003).

50 Subsequently, the Court held, 5-4, that the law was unconstitutional as a violation of separation of powers. Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015), presented below in Chapter 3. [Footnote by casebook author.]

51 The issue of impeachment and the Clinton impeachment proceedings are discussed more fully in Chapter 3.

CHAPTER 2

The Federal Legislative Power

A. Introduction: Congress and the States

A. INTRODUCTION: CONGRESS AND THE STATES

When may Congress act? What laws may Congress adopt? A basic principle of American government is that Congress may act only if there is express or implied authority in the Constitution, whereas states may act unless the Constitution prohibits the action. Article I of the Constitution, which creates the federal legislative power, begins by stating, "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." Additionally, the Tenth Amendment declares, "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."

In evaluating the constitutionality of any act of Congress, there are always two questions. First, does Congress have the authority under the Constitution to legislate? This requires defining the scope of the powers granted to Congress, particularly in Article I, §8 of the Constitution. Second, if so, does the law violate another constitutional provision or doctrine, such as by infringing separation of powers or interfering with individual liberties?

In answering both of these questions the issue has arisen throughout American history as to the extent to which concern for state governments and their prerogatives should matter. During some eras of constitutional history, such as between the late nineteenth century and 1937 and again in the past decade, concern for state governments has profoundly answered how the Court has dealt with both of these questions. The Court during these times limited congressional power to leave areas of governance to state governments. During these times, the Court also directly protected state sovereignty, concluding that even valid exercises of legislative power are unconstitutional when they infringe state sovereignty. The Court has used the Tenth Amendment as the basis for this protection of state governments from federal encroachment.

During other times of American history, however, the Court has refused to use concern over state governments either as a basis for narrowly interpreting the scope of Congress's powers or as a limit through the Tenth Amendment on the reach of federal legislation. From the 1930s until the 1990s, the Court broadly defined the scope of Congress's authority under Article I of the Constitution and refused to use the Tenth Amendment as a limit on federal power. Since the 1990s, the Court again has invalidated laws as exceeding the scope of Congress's powers and as violating the Tenth Amendment.

In other words, throughout American history, Congress's powers have been defined relative to the states. Some of the most important political battles in American history—abolition of slavery, Reconstruction, progressive labor legislation, the New Deal, the civil rights movement—have been fought over how power should be allocated between the federal and state governments.

The division of power between Congress and the states is the focus of this chapter. The chapter considers how Congress's powers enumerated in the Constitution should be defined. It also considers whether and when the Tenth Amendment, and its protection of state governments, is and should be a limit on congressional power.

The chapter begins with McCulloch v. Maryland, an enormously important case concerning the relationship between federal and state governments. Following *McCulloch*, the issue is raised as to the values to be gained and lost by safeguarding state government entities. As part of this discussion, the Court's most recent major federalism decision—National Federation of Independent Business v. Sebelius (2012), concerning the constitutionality of the Patient Protection and Affordable Care Act—is presented. It concerns issues examined in the following sections concerning the Necessary and Proper Clause, the Commerce Clause, the Spending Power, and the Tenth Amendment. Rather than divide the case and the dissents among the sections on this topic, it is presented as a whole, and each aspect can be considered in the context of the particular areas of federalism law. Subsequent sections of this chapter examine then particular federal powers, including the Necessary and Proper Clause (section B), especially Congress's Commerce Clause authority (section C), its taxing and spending power (section D), its authority under §5 of the Fourteenth Amendment (section E), and its power to authorize suits against state governments (section F).

THE FRAMEWORK FOR ANALYSIS: McCULLOCH v. MARYLAND

McCulloch v. Maryland is the most important Supreme Court decision in American history defining the scope of Congress's powers and delineating the relationship between the federal government and the states. The issue in *McCulloch* is whether it is constitutional for the State of Maryland to tax the Bank of the United States.

Some historical background is likely to be useful in understanding the decision. The controversy over the Bank of the United States began early in George Washington's presidency, in 1790, with a major dispute in both Congress and the executive branch as to whether Congress had the authority to create such a bank. Secretary of the Treasury Alexander Hamilton strongly favored creating a Bank of the United States, but he was opposed by Secretary of State Thomas Jefferson and Attorney General Edmund Randolph. Both Jefferson and Randolph argued that Congress lacked the authority under the Constitution to create such a bank and that doing so would usurp state government prerogatives. Ultimately, Hamilton persuaded President George Washington to support creating the bank, but the debate continued in Congress. James Madison, then in the House of Representatives, echoed the views of Jefferson and Randolph, and opposed the bank. Despite this opposition, Congress created the first Bank of the United States.

The bank existed for 21 years until its charter expired in 1811. However, after the War of 1812, the country experienced serious economic problems, and the Bank of the United States was re-created in 1816. In fact, although he had opposed such a bank a quarter of a century earlier, President James Madison endorsed its re-creation. The U.S. government actually owned only 20 percent of the new bank.

The Bank of the United States did not solve the country's economic problems and, indeed, many blamed the bank's monetary policies for aggravating a serious depression. State governments were particularly angry at the bank because the bank called in loans owed by the states. Several states adopted laws designed to limit the operation of the bank. Some states adopted laws prohibiting its operation within their borders. Others, such as Maryland, taxed it. The Maryland law required that any bank not chartered by the state pay either an annual tax of $15,000 or a tax of 2 percent on all of its notes that needed to be on special stamped paper.

The bank refused to pay the Maryland tax, and John James sued for himself and the State of Maryland in the County Court of Baltimore to recover the money owed under the tax. The defendant, McCulloch, was the cashier of that branch of the Bank of the United States. The trial court rendered judgment in favor of the plaintiffs, James, and the State of Maryland, and the Maryland Court of Appeals affirmed.

MCCULLOCH v. MARYLAND

17 U.S. (4 Wheat.) 316 (1819)

MARSHALL, Chief Justice, delivered the opinion of the court.

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

by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

[I]

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

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

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

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might “be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.”

This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have

assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

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From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

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

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

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

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the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, “anything in the constitution or laws of any state to the contrary notwithstanding.”

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only, that the powers “not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;” thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

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

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply

the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

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

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

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in a their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

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

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

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

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

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be

endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. “In carrying into execution the foregoing powers, and all others,” &c., “no laws shall be passed but such as are necessary and proper.” Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

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

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

[II]

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

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the

constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution. The argument on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right, in the confidence that they will not abuse it. Before we proceed to examine this argument, and to subject it to test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

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

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it

demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

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

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

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

WHAT ROLE SHOULD CONCERN OVER PROTECTING STATES HAVE IN DEFINING CONGRESS'S POWERS?

Throughout American history, a central issue has been the extent to which concern over protecting the prerogatives and institutions of state governments should matter in defining the scope of Congress's legislative power. Should Congress's authority, under provisions such as

the Commerce Clause and the spending power and §5 of the Fourteenth Amendment, be narrowly interpreted to leave more governance solely to the states? Or should Congress's powers be broadly defined without concern for preserving areas for state control? Should the Tenth Amendment be enforced by the judiciary as a limit on Congress's powers so as to protect state governments? Or should the Tenth Amendment be seen simply as a reminder that Congress can act only if it has express or implied authority, while states can act unless the Constitution prohibits their conduct?

These are the central questions throughout this chapter, and they are some of the most important in all of constitutional law. As alluded to earlier and as will be evident in the cases to follow, the Court has answered the questions differently at varying points in American history.

In considering these questions and how the Supreme Court has answered them, it is important to recognize that there are two key underlying normative issues. First, how important is the protection of state sovereignty and federalism? Second, should it be the role of the judiciary to protect state prerogatives or should this be left to the political process?

As to the former question, those who oppose judicial protection of states as a limit on Congress's power argue that national legislation is needed to deal with national problems. From this perspective, the Court should not circumscribe the scope of Congress's authority or use the Tenth Amendment to invalidate federal laws. On the other side, those who favor judicial use of federalism as a constraint on Congress's power usually identify three benefits of protecting state governments: decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas.

The first justification for protecting states from federal intrusions is that the division of power vertically, between federal and state governments, lessens the chance of federal tyranny.[1] The framers thought that the possibility of federal abuses could be limited by restricting the authority of the federal government.[2] Moreover, the danger of tyranny at the federal level is much more ominous than autocratic rule at the state or local level. Professor Rapczynski writes, "Should the federal government ever be captured by an authoritarian movement or assert itself as a special cohesive interest, the resulting oppression would almost certainly be much more severe and durable than any state would be capable."[3]

Yet others argue that the notion of radically limited federal powers seems anachronistic in the face of a modern national market economy and decades of extensive federal regulations. Additionally, there has been a major shift over time as to how abusive government is best controlled. Now it is thought that if a federal action intrudes upon individual liberties the federal judiciary will invalidate it as unconstitutional. Judicial review is seen as an important check against tyrannical government actions.

A second frequently invoked value of federalism is that states are closer to the people and thus more likely to be responsive to public needs and concerns.[4] Professor David Shapiro summarizes this argument when he writes, "[O]ne of the stronger arguments for a decentralized political structure is that, to the extent that the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people and democratic ideals are more fully realized."[5] However, there is a danger that the greater responsiveness increases the dangers of government tyranny. There is a

greater danger of special interests capturing government at smaller and more local levels. James Madison wrote of the danger of "factions" in Federalist 10 and modern political science literature offers support for his fears.[6]

Moreover, it is not clear what size of government unit is necessary for such responsiveness. For example, is a state the size of California, or for that matter a city the size of Los Angeles, sufficiently more homogeneous in its interests as to increase the likelihood of responsive government? Professor Shapiro writes, "[T]he goal of realizing democratic values to the maximum extent feasible may not be significantly enhanced by reducing the relevant polity from one of some 280,000,000 (the United States) to one of, say 30,000,000 (the State of California)."[7]

A final argument that is frequently made for protecting federalism is that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment might be fraught with serious consequences to the Nation. 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."[8] Justice O'Connor stated that the "Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas."[9]

However, any federal legislation preempting state or local laws limits experimentation. Indeed, the application of constitutional rights to the states limits their experimenting with providing fewer safeguards of individual liberties. The key questions are when is it worth experimenting and when is experimentation to be rejected because of a need to impose a national mandate?

There also is a related process question: Who is in the best position to decide when further experimentation is warranted or when there is enough knowledge to justify federal actions? Critics of judicial protection of states argue that the desire for using states as laboratories is a policy argument to be made to Congress against federal legislation and not a judicial argument that should be used to invalidate particular federal laws on the grounds that they unduly limit experimentation. Additionally, Congress and even federal agencies can design experiments and try differing approaches in varying parts of the country.

The second major question in evaluating judicial protection of states from federal encroachment is whether it should be the role of the judiciary to enforce the Tenth Amendment and protect state sovereignty or whether this is an issue that should be left to the political process. One view is that judicial enforcement of federalism as a limit on Congress is unnecessary because the political process will adequately protect state government interests. Professor Herbert Wechsler, in a landmark article, provided the intellectual foundation for this approach.[10] Wechsler argued that the interests of the states are represented in the national political process and that the nature of that process provides sufficient protection of state sovereignty, thus making it unnecessary for the courts to enforce federalism as a limit on Congress.

But the assumption that states' interests are adequately represented in the national political process is questionable. At the time the Constitution was written, states chose senators and thus were directly represented in Congress. Today, in contrast, with popular election of senators,

it is harder to argue that the states' interests as states are adequately protected in Congress. It seems unlikely that the voters, in choosing representatives and senators, weigh heavily the extent to which the individual legislator votes in a manner that serves the interests of the state as an entity.

The remaining material in this chapter concerns how the Supreme Court has defined the scope of Congress's powers under three crucial constitutional provisions: the commerce power, the spending power, and §5 of the Fourteenth Amendment. Other issues concerning Congress's powers, such as the authority to delegate power to administrative agencies and Congress's role in foreign policy, are discussed in the next chapter.

In examining Congress's commerce power, its spending power, its authority under §5 of the Fourteenth Amendment, and its power to authorize suits against state governments, consider how in different time periods the Court has evaluated the importance of protecting state governments and the judicial role in this regard. During some periods, the Court has expansively defined Congress's authority and refused to use the Tenth Amendment as a limit. During other times, including now, the Court has limited the scope of Congress's powers and viewed the Tenth Amendment as a constraint on Congress's authority.

The Court's most recent major decision concerning federalism was National Federation of Independent Business v. Sebelius, which addresses the constitutionality of the Patient Protection and Affordable Care Act. In it, the justices consider issues concerning the meaning of the Necessary and Proper Clause, the Commerce Clause, the Spending Power, and the Tenth Amendment. It is presented here, at the beginning of the chapter, with the expectation that each aspect can be considered in connection with the examination of each of these topics in the subsequent sections.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS

567 U.S. 519 (2012)

Chief Justice ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C, an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join, and an opinion with respect to Parts III-A, III-B, and III-D.

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." The power over activities that substantially affect interstate commerce can be expansive.

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison (1803).

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who

are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes.

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs—who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business.

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

II

Before turning to the merits, we need to be sure we have the authority to do so. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.

The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any *tax*." Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty." There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."

The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.

III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.

The Constitution grants Congress the power to "*regulate* Commerce." The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

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Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those

without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate.

B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes."

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017.

It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, §9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. A tax on going without health

insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

D

Justice Ginsburg questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

There is no doubt that the Act dramatically increases state obligations under Medicaid. Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated

from the electoral ramifications of their decision." Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER and Justice KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

I

According to the Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. Within the next decade, it is anticipated, spending on health care will nearly double.

The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. Most people will do so repeatedly.

Although every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are all at peril of needing medical care without a moment's notice.

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. As a group, uninsured individuals annually consume more than $100 billion in healthcare services, nearly 5% of the Nation's total. Over 60% of those without insurance visit a doctor's office or emergency room in a given year.

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay.

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for $43 billion worth of the $116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over $1,000 a year." Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. When sickness finally drives the uninsured to seek

care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance.

C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States' best interests. Congress' intervention was needed to overcome this collective-action impasse.

D

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. Second, Congress required insurers to use "community rating" to price their insurance policies. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. In the 1990's, several States—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers."

3

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation.

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing"; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop.

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, the Chief relies on a newly minted constitutional doctrine. The commerce power does not, the Chief Justice announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product."

The Chief Justice's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if the Chief Justice is correct that an insurance-purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," or "suite of products." Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating

the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain.

In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, the Chief Justice views the Clause as a "technical legal conception," precisely what our case law tells us not to do. These line-drawing exercises were untenable, and the Court long ago abandoned them.

Underlying the Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. This concern is unfounded. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent the Chief Justice's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. Other choices individuals make are unlikely to fit the same or similar description.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.

III

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." Hence, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. . . . The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes. But even assuming there were "practicable" alternatives to the minimum coverage provision, "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power." The minimum coverage provision meets this requirement.

IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. The Chief Justice Commerce Clause opinion, and even more so the joint dissenters' reasoning, bear a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend "for the . . . general Welfare of the United States." I concur in that determination, which makes the Chief Justice's Commerce Clause essay all the more puzzling. Why should the Chief Justice strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion.

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

The Chief Justice acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in the Chief Justice's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they

enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as the Chief Justice charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

The Chief Justice ultimately asks whether "the financial inducement offered by Congress . . . pass[ed] the point at which pressure turns into compulsion." The financial inducement Congress employed here, he concludes, crosses that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce. When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

For the reasons stated, I agree with the Chief Justice that, as to the validity of the minimum coverage provision, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed. In my view, the provision encounters no constitutional obstruction. Further, I would uphold the Eleventh Circuit's decision that the Medicaid expansion is within Congress' spending power.

Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second question is whether the congressional power to tax and spend, permits the conditioning of a State's continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.

I The Individual Mandate

Article I, §8, of the Constitution gives Congress the power to "regulate Commerce . . . among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, *purchasing* insurance *is* "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method," or "direct[ing] according to rule"; it directs the creation of commerce.

A

First, the Government submits that §5000A is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms." Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. If Congress can reach out and command even those furthest removed from an interstate market to

participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33, p. 202 (C. Rossiter ed. 1961).

The Government responds that the health-care market involves "essentially universal participation." The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance. Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

II The Taxing Power

As far as §5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority, and §5000A is therefore invalid.

In answering that question we must, if "fairly possible," construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional. But we cannot rewrite the statute to be what it is not. Our cases establish a clear line between a tax and a penalty: "'[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'"

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in 26 U.S.C. §5000A, entitled "*Requirement* to maintain minimum essential coverage." It commands that every "applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage." And the immediately following provision states that, "[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty*."

Quite separately, the fact that Congress (in its own words) "imposed . . . a penalty," 26 U.S.C. §5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: "[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act."

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. But we have never—*never*—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a "penalty."

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.

IV The Medicaid Expansion

We now consider respondents' second challenge to the constitutionality of the ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures. A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.

This practice of attaching conditions to federal funds greatly increases federal power. "[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution.

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. If a federal spending program coerces participation the States have not "exercise[d] their choice"—let alone made an "informed choice." Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

D

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in South Dakota v. Dole makes clear, theoretical voluntariness is not enough.

In South Dakota v. Dole, we considered whether the spending power permitted Congress to condition 5% of the State's federal highway funds on the State's adoption of a minimum drinking age of 21 years. The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly "crossed the line distinguishing encouragement from coercion," a federal program that coopts the States' political processes must be declared unconstitutional.

The Federal Government's argument in this case at best pays lip service to the anticoercion principle. The Federal Government suggests that it is sufficient if States are "free, *as a matter of law*, to turn down" federal funds.

This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.

E

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.

Medicaid has long been the largest federal program of grants to the States. In 2010, the Federal Government directed more than $552 billion in federal funds to the States. Of this, more than $233 billion went to pre-expansion Medicaid. *This amount equals nearly 22% of all state expenditures combined*. The States devote a larger percentage of their budgets to Medicaid than to any other item.

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, and equals only 6.6% of all state expenditures combined.

For these reasons, the offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending-power case.

What the statistics suggest is confirmed by the goal and structure of the ACA. In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends.

In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.

V

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety.

B. THE NECESSARY AND PROPER CLAUSE

In McCulloch v. Maryland, the Court interprets the "necessary and proper clause" in Article I, §8 as a grant of power to Congress, not a limitation. The Court says that Congress has the power to use any means, not prohibited by the Constitution, to carry out its authority.

In National Federation of Independent Business v. Sebelius, above, five justices rejected the argument that the individual mandate in the Affordable Care Act is a constitutional exercise of Congress's authority under the Necessary and Proper Clause.

There have been relatively few decisions in American history interpreting and applying the Necessary and Proper Clause. A recent decision, United States v. Comstock, 560 U.S. 126 (2010), does so. A federal statute, the Adam Walsh Child Protection Act of 2006, authorized federal courts to order the indefinite confinement of individuals in the custody of the federal Bureau of Prisons who are deemed to be "sexually dangerous." Earlier, in Kansas v. Hendricks, 521 U.A. 346 (1997), the Court ruled that it does not violate due process for a state to indefinitely imprison such individuals even after they have completed their prison sentences. The issue in *Comstock* is whether Congress had the constitutional authority to provide for such indefinite detentions.

The Supreme Court, in an opinion by Justice Breyer, upheld the federal law and stressed that this was permissible as an exercise of Congress's power under the necessary and proper clause. Justice Breyer quoted at length from McCulloch v. Maryland and said: "We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." The Court explained that "the relevant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement."

Using this approach, the Court decided that the indefinite commitment of sexually dangerous individuals fits within the scope of the necessary and proper clause. The Court stressed that Congress has the power, under the necessary and proper clause, to prescribe the sanctions for crimes that it creates. Continued commitment of the sexually dangerous fits within the scope of the necessary and proper clause as defined by Chief Justice Marshall in *McCulloch.* . . .

C. THE COMMERCE POWER

Article I, §8 states, "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Practically speaking, this provision has been the authority for a broad array of federal legislation, ranging from criminal statutes to securities laws to civil rights laws to environmental laws. From the perspective of constitutional law, the Commerce Clause has been the focus of the vast majority of Supreme Court decisions that have considered the scope of congressional power and federalism.

There have been roughly four eras of Commerce Clause jurisprudence. During the initial era, from early in American history until the 1890s, the commerce power was broadly defined but minimally used. In a period from the 1890s until 1937, the Court narrowly defined the scope of

Congress's commerce power and used the Tenth Amendment as a limit. The era from 1937 until the 1990s was a time when the Court expansively defined the scope of the commerce power and refused to apply the Tenth Amendment as a limit. Since the 1990s, the Court has again narrowed the scope of the commerce power and revived the Tenth Amendment as an independent, judicially enforceable limit on federal actions.

Throughout these eras, the Court is considering three questions. First: What is "commerce"? Is it one stage of business, or does it include all aspects of business—even life in the United States? Second: What does "among the several states" mean? Is it limited to instances where there is a direct effect on interstate commerce, or does any effect on interstate activities suffice? And third: Does the Tenth Amendment limit Congress? If Congress is acting within the scope of its commerce power, can a law be declared unconstitutional as violating the Tenth Amendment?

1. The Initial Era: Gibbons v. Ogden Defines the Commerce Power

The New York legislature granted a monopoly to Robert Fulton and Robert Livingston for operating steamboats in New York waters. Fulton and Livingston licensed Aaron Ogden to operate a ferryboat between New York City and Elizabethtown Port in New Jersey. Thomas Gibbons operated a competing ferry service and thus violated the exclusive rights given to Fulton and Livingston, and their licensee Ogden, under the monopoly. Gibbons maintained that he had the right to operate his ferry because it was licensed under a federal law as "vessels in the coasting trade." Nonetheless, Ogden successfully sued for an injunction in the New York state courts.

The Supreme Court considered the scope of Congress's powers and then whether the New York grant of a monopoly was constitutional. The latter aspect of the case, the permissibility of the state law, is discussed in Chapter 4. Below is the Court's discussion of the scope of Congress's commerce power.

GIBBONS v. OGDEN

22 U.S. (9 Wheat.) 1 (1824)

Chief Justice MARSHALL delivered the opinion of the Court.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to

this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized “to make all laws which shall be necessary and proper” for the purpose.

The words are, “Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” The subject to be regulated is commerce; and our constitution being one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word “commerce,” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word “commerce.”

To what commerce does this power extend? The constitution informs us, to commerce “with foreign nations, and among the several States, and with the Indian tribes.”

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

The subject to which the power is next applied, is to commerce “among the several States.” The word “among” means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

We are now arrived at the inquiry—What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely, in all representative governments.

During the remainder of the nineteenth century, until the 1890s, there were relatively few cases considering the scope of Congress’s Commerce Clause power. In the years after *Gibbons* and before the Civil War, the Supreme Court rarely considered challenges to federal legislation adopted under Congress’s Commerce Clause authority. After the Civil War, there were a few cases concerning the scope of the commerce power. Some of the cases continued *Gibbons*’s

expansive definition of commerce. For example, in *The Daniel Ball*, 77 U.S. (1 Wall.) 557 (1871), the Court accorded Congress broad authority to license ships, even those operating entirely intrastate, as long as the boats were carrying goods that had come from another state or that ultimately would go to another state. The Court explained that unsafe ships in intrastate commerce could affect and harm ships in interstate commerce.

Yet there also were a few cases that departed from *Gibbons* and invalidated federal legislation as exceeding the scope of the commerce power. The first case to overturn a federal law in this way was United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869), in 1870. A federal law outlawed the sale of naphtha and other illuminating oils that could ignite at less than 110 degrees Fahrenheit. The Court held that the law was "a police regulation, relating exclusively to the internal trade of the States." In a precursor to decisions that followed after the 1890s, the Court declared the law unconstitutional because it was "a virtual denial of any power to interfere with the internal trade and business of the separate States."

In *The Trademark Cases*, 100 U.S. (10 Otto) 82 (1878), the Court invalidated the federal law that established a federal system for registering trademarks. The Court concluded that the law was unconstitutional because it applied to wholly intrastate businesses and business transactions and therefore "is obviously the exercise of a power not confided to Congress."

2. The 1890s-1937: A Limited Federal Commerce Power

In the late nineteenth century, concurrent with the Industrial Revolution and the growth of the national economy, Congress began using the Commerce Clause much more extensively to regulate businesses. The Interstate Commerce Act in 1887 was largely meant to provide for federal regulation of railroads, and the Sherman Antitrust Act in 1890 was intended to combat monopolies and restraints of trade.

Beginning in the 1890s, the Supreme Court narrowly interpreted the scope of Congress's commerce power and used the Tenth Amendment as an independent constraint on congressional authority. Between the late nineteenth century and 1937, the Court was controlled by conservative justices deeply committed to laissez-faire economics and strongly opposed to government economic regulations. Many federal laws were invalidated as exceeding the scope of Congress's commerce power or as violating the Tenth Amendment and the zone of activities reserved to the states. Many state laws were invalidated as interfering with freedom of contract, which the Court found to be protected as a fundamental right under the liberty of the Due Process Clause.[11] So, for example, a federal law requiring a minimum wage during this period would be invalidated as exceeding the scope of Congress's power and as usurping states' prerogatives;[12] a state law requiring a minimum wage would be invalidated as impermissibly interfering with freedom of contract.[13]

This era of constitutional law is extremely important. It was the first time that the Supreme Court aggressively used its power of judicial review to invalidate federal and state laws. Constitutional law since 1937 has very much been a reaction to this earlier era. The Court did not invalidate another law as exceeding the scope of the Commerce Clause until 1995[14] and has generally very much deferred to federal and state economic regulations.

Although appreciating and understanding constitutional law in this era requires looking at all of these cases together, this chapter focuses solely on the decisions concerning the scope of

Congress's power. The Court's use of freedom of contract during this time period as a limit on state power is discussed in Chapter 6.

Between the late nineteenth century and 1937, the Court espoused a philosophy often termed "dual federalism." Dual federalism was the view that the federal and state governments were separate sovereigns, that each had separate zones of authority, and that it was the judicial role to protect the states by interpreting and enforcing the Constitution to protect the zone of activities reserved to the states.

Dual federalism was embodied in three important doctrines that the Court developed and followed during this time period. First, the Court narrowly defined the meaning of *commerce* so as to leave a zone of power to the states. Specifically, as described below, the Court held that commerce was one stage of business, distinct from earlier phases such as mining, manufacturing, or production. Under this view, only commerce itself could be regulated by Congress; the others were left for state regulation.

Second, the Court restrictively defined *among the states* as allowing Congress to regulate only when there was a substantial effect on interstate commerce. In all other areas, regulation again was left to the states.

Finally, the Court held that the Tenth Amendment reserved a zone of activities to the states and that even federal laws within the scope of the commerce clause were unconstitutional if they invaded that zone. For example, the Court held that regulation of production was left to the states, and therefore a federal law that prohibited shipment in interstate commerce of goods made by child labor was unconstitutional, even though it was limited to interstate commerce, because it violated the Tenth Amendment.[15]

Each of these three doctrines requires further elaboration. However, it should be noted at the outset that the Court was not completely consistent in applying these principles. The Court was most likely to follow them when considering federal economic regulations; the Court was least likely to adhere to them, and most willing to uphold federal laws, when they concerned federal morals regulation. Thus, as described below, the Court invalidated federal antitrust laws[16] and employment regulation statutes[17] but upheld federal laws prohibiting lotteries[18] and regulating sexual behavior.[19] Perhaps a principled distinction between these cases can be articulated, or more likely, the decisions were simply a product of the Court's particular brand of conservatism —economically conservative and thus aggressive in striking down economic regulations, morally conservative and thus deferential to laws directed at what was perceived as sin.

a. What Is "Commerce"?

The three doctrines described above created a powerful limit on the scope of Congress's power. First, the Court held that *commerce* was to be narrowly defined as one stage of business, separate and distinct from earlier phases such as mining, manufacturing, and production. In United States v. E.C. Knight, 156 U.S. 1 (1895), toward the beginning of this era, the Court held that the Sherman Antitrust Act could not be used to stop a monopoly in the sugar refining industry because the Constitution did not allow Congress to regulate manufacturing. The U.S. government attempted to use the Sherman Antitrust Act to block the American Sugar Refining Company from acquiring four competing refineries. The acquisition would have given the company control of over 98 percent of the sugar refining industry.

Nonetheless, the Court held that federal law could not be applied because the monopoly was in the production of sugar, not in its commerce. The Court flatly declared, “Commerce succeeds to manufacture, and is not a part of it.” The Court was clear that this rigid distinction was based on a need for preserving a zone of activities to the states. The Court explained that although the commerce power was one of the “strongest bond[s] of the union, . . . the preservation of the autonomy of the States [w]as required by our dual form of government.”

This distinction between manufacturing and commerce seems arbitrary; a company would desire a monopoly in production because it would benefit from monopoly profits in commerce. The Court acknowledged this but said that the relationship was too indirect to allow federal regulation under the commerce power. The Court said that it would be “far-reaching” to allow Congress to act “whenever interstate or international commerce may be ultimately affected.” The Court explained that the effect on commerce was only “indirect” and thus outside the scope of federal power.

This very limited definition of commerce continued throughout this era until 1937. For example, in Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court declared unconstitutional the Bituminous Coal Conservation Act of 1935. The law contained detailed findings as to the relationship between coal and the national economy and declared that the production of coal directly affected interstate commerce. The law provided for local coal boards to be established to determine prices for coal and to determine, after collective bargaining by unions and employers, wages and hours for employees. A shareholder in the Carter Coal Company sued it to stop it from complying with the law.

The Supreme Court, in an opinion by Justice Sutherland, declared the law unconstitutional. The Court focused on the unconstitutionality of federal regulation of wages and hours. The Court stated:

> [C]ommerce is the equivalent of the phrase “intercourse for the purposes of trade.” Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. . . . Mining brings the subject matter of commerce into existence. Commerce disposes of it.

The Court again emphasized that this narrow definition of commerce was essential to protect the states. The Court lamented, “Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of responsibilities . . . as to reduce them to little more than geographic subdivisions of the national domain.”

Decisions such as *E.C. Knight* and *Carter* rest on many assumptions: that it makes sense to distinguish commerce from other stages of business, that the Constitution requires that a rigid zone of activities be left to the states, and that it is the judicial role to protect this zone. From the late nineteenth century until 1937, these premises were fervently accepted by the Supreme Court.

b. What Does "Among the States" Mean?

The second major aspect of the Court's approach to the Commerce Clause during this era was the requirement that there be a direct effect on interstate commerce. For example, in the *Shreveport Rate Cases*, 234 U.S. 342 (1914), the Court upheld the ability of the Interstate Commerce Commission to set intrastate railroad rates because of their direct impact on interstate commerce. Specifically, a railroad was ordered to charge the same rates for shipments to Marshall, Texas, whether from Shreveport, Louisiana, or from Dallas, Texas. The Court upheld the federal regulation and held that "Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce." The Court said that Congress "does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."

The distinction between direct and indirect effects is inherently elusive and difficult to draw. In contrast to the *Shreveport Rate Cases*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), often referred to as the "sick chickens" case, declared a federal law unconstitutional based on an insufficient effect on interstate commerce. The National Industrial Recovery Act, a key piece of New Deal legislation, authorized the president to approve "codes of fair competition" developed by boards of various industries. Pursuant to this law, the president approved a Live Poultry Code for New York City. In part, the code was designed to ensure quality poultry by preventing sellers from requiring buyers to purchase the entire coop of chickens, including sick ones. The code also regulated employment by requiring collective bargaining, prohibiting child labor, and establishing a 40-hour workweek and a minimum wage.

The Supreme Court declared the code unconstitutional because there was not a sufficiently "direct" relationship to interstate commerce. Although the Court acknowledged that virtually all of the poultry in New York was shipped from other states, the Court said that the code was not regulating the interstate transactions; rather, the code concerned the operation of businesses within New York. The Court emphasized that Congress only could regulate when there was a direct effect on interstate commerce. The Court explained, "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." The federal government has the authority to regulate when there are direct effects on commerce, "[b]ut where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."

The Court once again explained that this distinction was essential to protect state governments and ultimately the American system of government. The Court stated, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." The Court thus declared that enforcing the distinction between direct and indirect effects on commerce "must be recognized as . . . essential to the maintenance of our constitutional system."

The difficulty, of course, is in drawing a meaningful and useful distinction between direct and indirect effects. The Court struggled with this throughout the era. One approach that the Court often used was to allow Congress to regulate to protect the stream of commerce. The Court

initially articulated this approach in Swift & Co. v. United States, 196 U.S. 375 (1905), which upheld the application of the Sherman Antitrust Act to an agreement among meat dealers to fix the price at which they would purchase meat from stockyards. Although the stockyard was intrastate, the Court stressed how it was only a temporary stop for the cattle. Justice Holmes, writing for the Court, explained that the stockyards were in "a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

Likewise, in Stafford v. Wallace, 258 U.S. 495 (1922), for example, the Court upheld the Packers and Stockyards Act of 1921, which authorized the secretary of commerce to regulate rates and prescribe standards for the operation of stockyards where livestock was kept. The law was designed to protect consumers by lessening collusion between stockyard managers and packers and also by decreasing the ability of packers to set prices for livestock. The Supreme Court upheld the federal law emphasizing that the stockyards are in the stream of commerce. Chief Justice Taft, writing for the Court, explained that the "stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character."

The Court relied on this stream of commerce approach to allow Congress to prohibit the sale of impure or adulterated food or drugs,[20] to require retail labeling for items traveling in interstate commerce,[21] and to restrict the sale of intoxicating beverages to Indians.[22]

The Court, however, did not consistently apply its stream of commerce approach. For example, in Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935), the Court declared unconstitutional the Railroad Retirement Act of 1934, which provided a pension system for railroad workers. Railroads obviously were part of the stream of interstate commerce, and the Court had upheld other federal regulations of railroads. In Southern Railway v. United States, 222 U.S. 20 (1911), the Court upheld the Federal Safety Appliance Acts, which regulated couplers on railroad cars. In Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U.S. 612 (1911), the Court upheld a federal law that set maximum hours for railroad workers.

Yet in the *Alton R.R. Co.* case the Court struck down the requirement for a pension for railroad workers and distinguished the other cases as concerning the safety or efficiency of the railroads. The Court said that Congress could not use its commerce power to require a pension program for railroad employees because the law was only to help "the social welfare of the worker, and therefore [was] remote from any regulation of commerce."

The key point is that the Court interpreted "among the states" as requiring a direct effect on interstate commerce. Yet the Court never formulated a clear or consistent way to distinguish direct from indirect effects. Why did intrastate railroad rates have a direct effect on interstate commerce, while regulations designed to limit the shipment of sick chickens in interstate commerce have only an indirect effect? The stream of commerce approach was sometimes used during this era to evaluate whether an activity was among the states. Yet the Court was no more consistent in applying this test. Why are prices at stockyards in the stream of commerce but practices at poultry farms not part of that stream?

c. Does State Sovereignty Limit Congressional Power?

Finally, the Court held that even if an activity was commerce and was among the states, Congress still could not regulate if it was intruding into the zone of activities reserved to the states. The Court concluded that the Tenth Amendment reserved control of activities such as mining, manufacturing, and production to the states. Even federal laws regulating commerce among the states were unconstitutional if they sought to control mining, manufacturing, and production.

The Child Labor Case (Hammer v. Dagenhart), 247 U.S. 251 (1918), was the most significant decision to use the Tenth Amendment in this way. A federal law prohibited the shipment in interstate commerce of goods produced in factories that employed children under age 14 or employed children between the ages of 14 and 16 for more than eight hours per day or six days a week. Although the law only regulated goods in interstate commerce, the Court declared it unconstitutional because it controlled production. The Court declared that "[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture." The Court said that regulating the hours of labor of children was entrusted "purely [to] state authority." The Court expressly rejected the argument that federal legislation was necessary to prevent unfair competition; states that wanted to outlaw child labor would find it difficult to do so as long as other states allowed child labor.

Indeed, the Court spoke in apocalyptic terms as to the consequences if Congress was accorded such regulatory power: "The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

The Child Labor Case can be contrasted to another decision from that era, *The Lottery Case* (Champion v. Ames), 188 U.S. 321 (1903), in which the Court upheld a federal law prohibiting the interstate shipment of lottery tickets. In both *The Child Labor Case* and *The Lottery Case*, the federal law prohibited the shipment of a specified item—goods made by child labor or lottery tickets—in interstate commerce. In both, Congress obviously was seeking to stop intrastate activities: the use of child labor and gambling in lotteries. Yet in the former the Court declared the federal law unconstitutional, whereas in the latter the Court upheld the federal law.

In *The Lottery Case*, the Court made it clear that the power to regulate interstate commerce includes the ability to prohibit items from being in interstate commerce. The Court concluded that it was within Congress's Commerce Clause power to stop lottery tickets from being a part of interstate commerce. The Court declared, "If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"

The Court explicitly rejected the argument that the federal law violated the Tenth Amendment and intruded on state government prerogatives. Also, the Court rejected the argument that according Congress such power would give Congress seemingly limitless authority and would endanger the constitutional structure. The Court simply said, "[T]he possible abuse of a power is not an argument against its existence."

Thus, the Court did not consistently define the zone of activities reserved to the states. Yet the Court during this era clearly believed in dual sovereignty and used it to limit federal power.

Perhaps there are principled distinctions between these cases, or perhaps they simply reflect a conservative Court much more willing to defer to morals laws than to economic regulations. Whatever the cause, these three doctrines—the narrow definition of commerce, the restrictive interpretation of among the states, and the use of state sovereignty as a constraint on congressional power—all advanced dual federalism and all limited the scope of Congress's authority under the Commerce Clause.

3. 1937-1990s: Broad Federal Commerce Power

By the mid-1930s, there were enormous pressures for a change in the Supreme Court's narrow approach to defining the scope of Congress's power. It must be remembered that during this time the Court also was narrowly interpreting the scope of other congressional powers, such as the spending power (discussed below), and greatly restricting the ability of state governments to regulate the economy by protecting freedom of contract under substantive due process (discussed in Chapter 6).

The economic crisis caused by the Depression made the Supreme Court's hostility to economic regulation and its commitment to a laissez-faire economy seem anachronistic and harmful. Unemployment was widespread, and the wages of those with jobs were low. Business failure was endemic, and production was substantially lessened. Foreclosures of home and farm mortgages were common.

Strong political pressure developed for change. President Franklin Roosevelt won a landslide reelection victory in 1936 and saw this as a strong endorsement for the New Deal programs that the Court was invalidating, such as in Carter v. Carter Coal and Schechter Poultry v. United States. In March 1937, Roosevelt proposed that Congress adopt legislation to increase the size of the Supreme Court. Under the proposal, one justice would be added to the Court for each justice over age 70, up to a maximum of 15 justices. In light of the ages of the justices then on the Court, Roosevelt would have been able to add six new justices and thus secure a majority on the Court to uphold the New Deal programs.

Roosevelt's Court-packing plan drew intense opposition, even from some supporters of New Deal programs, on the ground that it was a threat to the independence of the federal judiciary. It is worth noting, however, that nothing in the Constitution mandated or even suggested a number of justices for the Court. The first Judiciary Act prescribed a Court of six. This was temporarily reduced to five in 1801 and increased back to six in 1802. The number of justices was increased to seven in 1807, to nine in 1837, and to ten in 1864. Generally, the increase in the size of the Court was a result of the addition of a new federal circuit court of appeals. Supreme Court justices were responsible for "riding circuit" and sitting as federal appeals court judges; an additional justice was created each time the country expanded and a new circuit was added.

In 1866, with unpopular President Andrew Johnson in the White House, Congress reduced the size of the Supreme Court to seven. This kept Johnson from filling an existing vacancy on the Court and meant that the next two vacancies also would go unfilled in order to bring the Court's size down from ten to seven. In 1869, after Ulysses Grant became president, the number on the Court was increased to nine, where it has been ever since.

Although the number of justices was not specified in the Constitution, Roosevelt's Court-packing plan was intensely opposed as a threat to judicial independence. In 1937, Justice Owen Roberts changed his position and was the fifth to uphold two laws of the type that previously had been invalidated: a state minimum wage law for women and a federal law regulating labor relations.[23] There is a debate over whether Roberts was influenced by the political pressure of the Court-packing plan or whether he planned to change his vote prior to Roosevelt's proposal. Whatever the cause, Roberts's change in sentiment will forever be known as "the switch in time that saved nine."

KEY DECISIONS CHANGING THE COMMERCE CLAUSE DOCTRINE

Three decisions—NLRB v. Jones & Laughlin Steel Corp. in 1937, United States v. Darby in 1941, and Wickard v. Filburn in 1942—overruled the earlier era of decisions and expansively defined the scope of Congress's commerce power. Indeed, because of these three decisions, from 1937 until 1995, not one federal law was declared unconstitutional as exceeding the scope of Congress's commerce power. These three key rulings are presented and then followed by consideration of how the Court defined "commerce among the states" after these decisions and how the Court treated the Tenth Amendment prior to the 1990s.

NLRB v. JONES & LAUGHLIN STEEL CORP.

301 U.S. 1 (1937)

Chief Justice HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935 the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the act by engaging in unfair labor practices affecting commerce. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pa. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore & Ohio Railroad systems. It owns the Aliquippa & Southern Railroad Company, which connects the Aliquippa

works with the Pittsburgh & Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semifinished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases, and operates stores, warehouses, and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 percent of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self- contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

The act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the act to interstate and foreign commerce are colorable at best; that the act is not a true regulation of such commerce or of matters which directly affect it, but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation.

If this conception of terms, intent and consequent inseparability were sound, the act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. There can be no question that the commerce thus contemplated by the act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The act also defines the term "affecting commerce": "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate

or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion.

Respondent says that, whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce.

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control, and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved.

Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife.

Justice McReynolds delivered the following dissenting opinion.

Justice Van Devanter, Justice Sutherland, Justice Butler and I are unable to agree with the decisions just announced. The Court as we think departs from well-established principles followed in Schechter Poultry Corporation v. United States, and Carter v. Carter Coal Co. In each cause the Labor Board formulated and then sustained a charge of unfair labor practices towards persons employed only in production. It ordered restoration of discharged employees to former positions with payment for losses sustained. These orders were declared invalid below upon the ground that respondents while carrying on production operations were not thereby engaging in interstate commerce; that labor practices in the course of such operations did not directly affect interstate commerce; consequently respondents' actions did not come within congressional power.

The wide sweep of the statute will more readily appear if consideration be given to the Board's proceedings against the smallest and relatively least important—the Clothing Company. If the act applies to the relations of that Company to employees in production, of course it applies to the larger respondents with like business elements although the affairs of the latter may present other characteristics. Though differing in some respects, all respondents procure raw materials outside the state where they manufacture, fabricate within and then ship beyond the state. Manifestly that view of congressional power would extend it into almost every field of human industry.

UNITED STATES v. DARBY

312 U.S. 100 (1941)

Justice Stone delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours.

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.

Section 15 of the statute prohibits certain specified acts and punishes willful violation of it by a fine of not more than $10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15(a)(1) makes unlawful the

shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6(206) or section 7(207)," which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or in the production of goods for [interstate] commerce," and that the maximum hours of employment for employees "engaged in commerce or in the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week.

The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution." Gibbons v. Ogden. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of Gibbons v. Ogden, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in Hammer v. Dagenhart. Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned.

The conclusion is inescapable that Hammer v. Dagenhart, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.

Our conclusion is unaffected by the Tenth Amendment which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

WICKARD v. FILBURN

317 U.S. 111 (1942)

Justice JACKSON delivered the opinion of the Court.

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

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee’s 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all.

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

It is urged that under the Commerce Clause of the Constitution, Article I, §8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby, sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect."

We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can consideration of its economic effects be foreclosed by calling them "indirect." Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

These three cases adopt broad definitions of "commerce" and "among the states" and reject the Tenth Amendment as a limit on Congress's Commerce Clause power. Commerce includes all stages of business; no longer is a distinction drawn between commerce and other stages of business such as mining, manufacture, and production. Congress can regulate any activity, intrastate or interstate, that has a substantial effect on interstate commerce. Indeed, Congress can regulate activities that themselves have little effect on interstate commerce if the activity, looked at cumulatively throughout the country, has a substantial effect on commerce. The Tenth Amendment, as *Darby* states, is simply a reminder that for Congress to legislate it must point to express or implied power. The Tenth Amendment is no longer seen as reserving a zone of activities for exclusive state control.

This expansive definition of Congress's commerce power continued from 1937 until the 1990s. From 1937 until 1992, not one federal law was invalidated as exceeding the scope of Congress's Commerce Clause authority and only once was a federal law found to violate the Tenth Amendment, and that case was expressly overruled less than a decade later. In describing the law after *Jones & Laughlin*, *Darby*, and *Wickard*, initially the cases concerning the meaning of "commerce among the states" are described, followed by an examination of cases concerning the Tenth Amendment during this time period.

THE MEANING OF "COMMERCE AMONG THE STATES"

Consider three areas where the Court had the occasion to consider the meaning of "commerce among the states" after 1937: civil rights laws, regulatory laws, and criminal laws.

Civil Rights Laws

The Civil Rights Act of 1964 is among the most important federal laws enacted during the twentieth century. The law prohibits private employment discrimination based on race, gender, or religion, and forbids racial discrimination by places of public accommodation such as hotels and restaurants. Congress enacted this legislation under its Commerce Clause power.

Logically, it might seem that the civil rights law would be most easily justified under Congress's authority pursuant to §5 of the Fourteenth Amendment. However, the Supreme Court, in the *Civil Rights Cases*, 109 U.S. 3 (1883), held that Congress, pursuant to §5, only could regulate government conduct and could not regulate private behavior under the Fourteenth Amendment.[24] Therefore in 1964, it was uncertain whether Congress could use its Fourteenth Amendment power to outlaw private discrimination in employment and public accommodations. Congress thus chose the Commerce Clause as the authority for this landmark legislation.[25]

HEART OF ATLANTA MOTEL, INC. v. UNITED STATES

379 U.S. 241 (1964)

Justice CLARK delivered the opinion of the Court.

This is a declaratory judgment action, attacking the constitutionality of Title II of the Civil Rights Act of 1964. The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce. The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts.

Our study of the legislative record has brought us to the conclusion that Congress possessed ample power in this regard. While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and

convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case* (Champion v. Ames); to criminal enterprises, Brooks v. United States (1925); to deceptive practices in the sale of products, Federal Trade Comm. v. Mandel Bros., Inc. (1959); to fraudulent security transactions, Securities & Exchange Comm. v. Ralston Purina Co. (1953); to misbranding of drugs, Weeks v. United States (1918); to wages and hours, United States v. Darby (1941); to members of labor unions, National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937); to crop control, Wickard v. Filburn (1942); to discrimination against shippers, United States v. Baltimore & Ohio R. Co. (1948); to the protection of small business from injurious price cutting, Moore v. Mead's Fine Bread Co. (1954); to resale price maintenance, Hudson Distributors, Inc. v. Eli Lilly & Co. (1964); to professional football, Radovich v. National Football League (1957); and to racial discrimination by owners and managers of terminal restaurants, Boynton v. Virginia, 364 U.S. 454 (1960).

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed —what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Justice DOUGLAS, concurring.

Though I join the Court's opinions, I am somewhat reluctant here, to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right of persons to move freely from State to State," "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." [T]he result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the individual not with the impact on commerce of local activities or vice versa.

Hence I would prefer to rest on the assertion of legislative power contained in §5 of the Fourteenth Amendment. A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.

KATZENBACH v. MCCLUNG, SR. & MCCLUNG, JR.

379 U.S. 294 (1964)

Justice CLARK delivered the opinion of the Court.

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

The basic holding in *Heart of Atlanta Motel*, answers many of the contentions made by the appellees. There we outlined the overall purpose and operations plan of Title II and found it a valid exercise of the power to regulate interstate commerce insofar as it requires hotels and motels to serve transients without regard to their race or color. In this case we consider its application to restaurants which serve food a substantial portion of which has moved in commerce.

Ollie's Barbecue admits that it is covered by the Act. The Government makes no contention that the discrimination at the restaurant was supported by the State of Alabama. There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress.

We believe that [the extensive] testimony [before Congress about the effects of discrimination by restaurants] afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. Hence the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." p. 179

Much is said about a restaurant business being local but "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ." Wickard v. Filburn. The activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." Gibbons v. Ogden. This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce. Here, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question—one answered in the affirmative by the court below—is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

Regulatory Laws

HODEL v. INDIANA, 452 U.S. 314 (1981): The Court upheld a federal law that regulated strip mining and required reclamation of strip-mined land.

The Court found that this law was within the scope of Congress's Commerce Clause authority and described this power in expansive terms. The Court declared, "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."

It is worth noting that not all of the Justices agreed with this broad definition of the commerce power. Justice Rehnquist, in a companion case, wrote: "It would be a mistake to conclude that Congress's power to regulate . . . is unlimited. Some activities may be so private or local in nature that they may not be in commerce. . . . [The] Court asserts that regulation will be upheld if Congress had a rational basis for finding that the regulated activity affects interstate commerce. . . . [But] it has long been established that . . . [t]here must instead be a showing that the regulated activity has a *substantial effect* on that commerce."[26]

Criminal Laws

PEREZ v. UNITED STATES, 402 U.S. 146 (1971): Justice Douglas wrote the opinion for the Court.

The question in this case is whether Title II of the Consumer Credit Protection Act, is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution. Petitioner is one of the species commonly known as "loan sharks" which Congress found are in large part under the control of "organized crime." "Extortionate credit transactions" are defined as those characterized by the use or threat of the use of "violence or other criminal means" in enforcement. There was ample evidence showing petitioner was a "loan shark" who used the threat of violence as a method of collection.

The constitutional question is a substantial one. The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce. It is with this last category that we are here concerned.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. The findings by Congress are quite adequate on that ground. The McDade Amendment in the House, was the one ultimately adopted. As stated by Congressman McDade it grew out of a "profound study of organized crime, its ramifications and its implications." The results of that study were included in a report, The Urban Poor and Organized Crime, submitted to the House on August 29, 1967, which revealed that "organized crime takes over $350 million a year from America's poor through loan-sharking alone." Congressman

McDade also relied on The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967) which stated that loan sharking was "the second largest source of revenue for organized crime," and is one way by which the underworld obtains control of legitimate businesses.

The essence of all these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Justice STEWART, dissenting.

Congress surely has power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.

THE TENTH AMENDMENT BETWEEN 1937 AND THE 1990s

In United States v. Darby, above, the Court declared that the Tenth Amendment is "but a truism," simply a reminder that for Congress to act it must have authority under the Constitution. This

approach to the Tenth Amendment was followed without exception until 1976, when the Court invalidated a federal law for violating the Tenth Amendment.

In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court, by a five-to-four margin, declared unconstitutional the application of the Fair Labor Standards Act, which required payment of the minimum wage to state and local employees. The Court began with the premise that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." The Court found that requiring states to pay their employees the minimum wage violated the Tenth Amendment because the law "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."

The Court explained that forcing state and local governments to pay their employees the minimum wage would require that they either raise taxes or cut other services to pay these costs. The Court said that this would displace decisions traditionally left to the states and "may substantially restructure traditional ways in which the local governments have arranged their affairs." In other words, National League of Cities v. Usery held that Congress violates the Tenth Amendment when it interferes with traditional state and local government functions. The Court, however, did not attempt to define what is such a traditional function; the Court only held that forcing payment of the minimum wage was unconstitutional.

Justice Harry Blackmun wrote a concurring opinion that said that he saw the majority as adopting "a balancing approach [that] . . . does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

Justice William Brennan wrote for the four dissenters and lamented the Court's use of the Tenth Amendment as a limit on congressional power: "My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. . . . Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree. The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930s."

In the decade after *National League of Cities*, the Supreme Court rejected Tenth Amendment challenges to several other federal laws and continually narrowed the Tenth Amendment protection provided in that decision. In each case, Justice Blackmun voted with the majority, often as the crucial fifth vote refusing to extend or apply National League of Cities v. Usery.

In Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981), the Court made it clear that *Usery* only applied when Congress was regulating state governments, not when Congress was regulating private conduct. In *Hodel*, the Court upheld a federal law that regulated strip mining and required reclamation of strip-mined land. The Court clarified its test for the Tenth Amendment in light of *Usery*. The Court said that for a federal law to violate the Tenth Amendment, it needed to regulate "the States as States"; it must "address matters that are indisputably attribute[s] of state sovereignty"; it must directly impair the States' ability to "structure integral operations in areas of traditional governmental functions"; and it must not be such that "the nature of the federal interest . . . justifies state submission." The Court in *Hodel*

found that the law, the Surface Mining Control and Reclamation Act of 1977, was constitutional because it did not regulate the states as states. In several other cases, the Court also rejected Tenth Amendment challenges to federal laws.[27] p. 183

In 1985, the Court expressly overruled *National League of Cities*.

GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

469 U.S. 528 (1985)

Justice BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in National League of Cities v. Usery. In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities.* Many constitutional standards involve "undoubte[d] . . . gray areas," and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause.

We believe, however, that there is a more fundamental problem at work here, a problem that explains why an attempt to draw distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. p. 184

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular

governmental function is “integral” or “traditional.” Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government’s power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them.

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress’s authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress’s actions with respect to the States.

What has proved problematic is not the perception that the Constitution’s federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’s Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for “fundamental” elements of state sovereignty, a problem we have witnessed in the search for “traditional governmental functions.”

Apart from the limitation on federal authority inherent in the delegated nature of Congress’s Article I powers, the principal means chosen by the framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.[28] It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U.S. Const., Art. I, §2, and Art. II, §1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, §3. The significance attached to the States’ equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State’s consent. Art. V.

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the framers. James Madison explained that the Federal Government “will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.” The Federalist No. 46.

The effectiveness of the federal political process in preserving the States’ interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act. In the past quarter-century alone, federal grants to States and localities have grown from $7 billion to $96 billion. As a result, federal grants now account for about one-fifth of state and local government expenditures. The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation. Moreover, at the same time that the States have exercised their influence to obtain

federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause.

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process. Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

National League of Cities v. Usery is overruled.

Justice POWELL, with whom THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

The Court today, in its 5-4 decision, overrules National League of Cities v. Usery, a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments. Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. There have been few cases, however, in which the principle of stare decisis and the rationale of recent decisions were ignored as abruptly as we now witness. The reasoning of the Court in *National League of Cities*, and the principle applied there, have been reiterated consistently over the past eight years.

Whatever effect the Court's decision may have in weakening the application of stare decisis, it is likely to be less important than what the Court has done to the Constitution itself. A unique feature of the United States is the federal system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court's opinion to

the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

To leave no doubt about its intention, the Court renounces its decision in *National League of Cities* because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." In other words, the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty. Members of Congress are elected from the various States, but once in office they are Members of the Federal Government. Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power. . . ." INS v. Chadha (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.

The Court apparently thinks that the State's success at obtaining federal funds for various projects and exemptions from the obligations of some federal statutes is indicative of the "effectiveness of the federal political process in preserving the States' interests. . . ." But such political success is not relevant to the question whether the political processes are the proper means of enforcing constitutional limitations. The fact that Congress generally does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so. The States' role in our system of government is a matter of constitutional law, not of legislative grace. "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." U.S. Const., Amdt. 10.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, i.e., that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, e.g., The Federalist No. 78 (Hamilton). At least since Marbury v. Madison (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of Acts of Congress. In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the teaching of the most famous case in our history.

[T]he Court today propounds a view of federalism that pays only lipservice to the role of the States. Although it says that the States "unquestionably do 'retai[n] a significant measure of sovereign authority,'" it fails to recognize the broad, yet specific areas of sovereignty that the framers intended the States to retain. Indeed, the Court barely acknowledges that the Tenth

Amendment exists. Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy.

Justice REHNQUIST, dissenting.

I join both Justice Powell's and Justice O'Connor's thoughtful dissents. [U]nder any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

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4. 1990s-???: Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress

In the 1990s, the Supreme Court once more changed course with regard to the scope of Congress's powers under the Commerce Clause and whether the Tenth Amendment is a limit on federal power. In 1995, in United States v. Lopez, the Supreme Court for the first time in almost 60 years found that a federal law exceeded Congress's Commerce Clause authority. *Lopez* led to challenges to literally dozens of federal laws. In 2000, the Court reaffirmed *Lopez* in United States v. Morrison. Additionally, in 1992, in New York v. United States and in 1997, in Printz v. United States, the Court again used the Tenth Amendment to protect state governments from federal encroachments. All of these cases are presented below. Additionally, of course, both the commerce power and the Tenth Amendment are discussed in National Federation of Independent Business v. Sebelius, which is presented above.

In reading these recent decisions concerning the Commerce Clause and the Tenth Amendment, it will be helpful to focus on two questions, one descriptive and one normative. Descriptively, what principles does the Court articulate as to when Congress exceeds the scope of its Commerce Clause authority and when Congress violates the Tenth Amendment? Normatively, does the Court persuasively justify the desirability of these limits on federal powers?

a. What Is Congress's Authority to Regulate "Commerce Among the States"?

UNITED STATES v. LOPEZ

514 U.S. 549 (1995)

Chief Justice REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q)(1)(A). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States. . . ."

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets. Acting

upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."

Respondent waived his right to a jury trial. The District Court conducted a bench trial, found him guilty, and sentenced him to six months' imprisonment and two years' supervised release.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45. This constitutionally mandated division of authority "was adopted by the framers to ensure protection of our fundamental liberties." "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

[The Court then reviewed the history of Commerce Clause decisions from Gibbons v. Ogden through the early 1940s.] *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce. But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. See, e.g., *Darby; Heart of Atlanta Motel.* Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, e.g., *Shreveport Rate Cases* (1914); Southern R. Co. v. United States (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce). Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones* & *Laughlin Steel*, i.e., those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress's power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact §922(q). The first two categories of authority may be quickly disposed of: §922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can §922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if §922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, §922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in United States v. Bass (1971), the Court interpreted former 18 U.S.C. §1202(a), which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." The Court interpreted the possession component of §1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Unlike the statute in *Bass*, §922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

The Government's essential contention, is that we may determine here that §922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A

handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that §922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress's commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress's authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause

to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

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It would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have

not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. Milliken v. Bradley (1974); Epperson v. Arkansas (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed.

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining. These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns; programs to encourage the voluntary surrender of guns with some provision for amnesty; penalties imposed on parents or guardians for failure to supervise the child; laws providing for suspension or expulsion of gun-toting students.

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. Each of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. Yet throughout these areas, school officials would find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the framers designed and that this Court is obliged to enforce.

Justice THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a

future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical." I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government."

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture.

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Put simply, much if not all of Art. I, §8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect

interstate commerce. An interpretation of cl. 3 that makes the rest of §8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, §8.

Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of §8 all mutually overlap, something we can assume the Founding Fathers never intended.

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See Carter v. Carter Coal Co. (1936); see also A.L.A. Schechter Poultry Corp. v. United States (1935). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce.

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities as a whole substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation.

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial

effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "commensurate with the national needs" or self-consciously intended to let the Federal Government "defend itself against economic forces that Congress decrees inimical or destructive of the national economy." Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

Justice STEVENS, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States," U.S. Const., Art. I, §8, cl. 3, is vitally dependent on the character of the education of our children. I therefore agree entirely with Justice Breyer's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools—just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with Justice Souter's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress's power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

Justice SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." Hodel v. Virginia Surface Mining & Reclamation Assn., Inc. (1981). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'"

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of

judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began.

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

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," U.S. Const., Art. I, §8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. See, e.g., Gibbons v. Ogden (1824); Wickard v. Filburn. As the majority points out, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools). See, e.g., *Wickard*.

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court

recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding.

Applying these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the explicit finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," the answer to this question must be yes. Numerous reports and studies—generated both inside and outside government—make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them; that 20 percent of those students have been threatened with guns; and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U.S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, e.g., House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U.S. Dept. of Health 118-119 (1978) (school-violence victims suffer academically). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

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Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. [T]here is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education.

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," Perez v. United States, and that unfair labor practices pose to instrumentalities of

commerce. As I have pointed out, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." The violence-related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," . . . ; nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. First, this statute is aimed at curbing a particularly acute threat to the educational process—the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

The majority's holding—that §922 falls outside the scope of the Commerce Clause—creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence.

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, e.g., 18 U.S.C. §844(i) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, e.g., 18 U.S.C. §922(o)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element?

Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.

UNITED STATES v. MORRISON

529 U.S. 598 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. §13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down §13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. [W]e affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, "You better not have any . . . diseases." In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and. . . ." The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Section 13981 was part of the Violence Against Women Act of 1994. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." To enforce that right, subsection (c) declares: "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."

[II]

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question whether §13981 falls within Congress's power under Article I, §8, of the Constitution. Brzonkala and the United States rely upon the third clause of the Article, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[29]

As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." "First, Congress may regulate the use of the channels of interstate commerce." "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." "Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain §13981 as a regulation of activity that substantially affects interstate commerce. Given §13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in

our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Like the Gun-Free School Zones Act at issue in *Lopez*, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce. In contrast with the lack of congressional findings that we faced in *Lopez*, §13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."

In these cases, Congress's findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103-711.

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded.

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted.

Justice THOMAS, concurring.

The majority opinion correctly applies our decision in United States v. Lopez (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress's powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless

and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

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

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied.

Applying those propositions in these cases can lead to only one conclusion. One obvious difference from United States v. Lopez, is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings. Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges.

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990. Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets—women—from full partic[ipation] in the national economy."

Why is the majority tempted to reject the lesson so painfully learned in 1937? If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism.

It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy.

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once.

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

In two cases, the Court has narrowly construed federal laws to avoid the question of whether they exceed the scope of Congress's commerce power. In United States v. Jones, 529 U.S. 848 (2000), the Supreme Court unanimously held that the federal Arson Act does not apply to arson of a dwelling. The Court, in an opinion by Justice Ginsburg, said that applying the Arson Act to arson of a private residence would raise serious constitutional issues concerning Congress's power under the Commerce Clause. As a result, the Court said to avoid "constitutional doubts" it would interpret the law to not apply to such acts.

The Court took the same approach, although in a much more closely divided decision, in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001). The issue was whether the Clean Water Act, which applies to "navigable waters," could be applied to intrastate waters because of the presence of migratory birds. The Court, five to four, said no, holding that it would interpret the statute this way so as to avoid constitutional doubts.

Chief Justice Rehnquist, working for the Court, stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

> Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See United States v. Morrison (2000); United States v. Lopez (1995). Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," Missouri v. Holland (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

> These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

Justice Stevens, writing for the four dissenting justices, argued that the Army Corps of Engineers had the authority to apply the Clean Water Act to intrastate waters because of the presence of migratory birds. He wrote:

> Contrary to the Court's suggestion, the Corps' interpretation of the statute does not "encroac[h]" upon "traditional state power" over land use. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." California Coastal Comm'n v. Granite Rock Co. (1987). The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power. Hodel v. Virginia Surface Mining & Reclamation Assn., Inc. (1981).

> The Corps' exercise of its §404 permitting power over "isolated" waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence. In United States v. Lopez (1995), this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress' power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the class of activities in question has such an effect.
>
> The activity being regulated in this case (and by the Corps' §404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction over petitioner's land simply because the waters were "used as habitat by migratory birds." It asserted jurisdiction because petitioner planned to discharge fill into waters "used as habitat by migratory birds." Had petitioner intended to engage in some other activity besides discharging fill (i.e., had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (i.e., had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in United States v. Morrison (2000) ("[g]ender-motivated crimes"), and *Lopez* (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons.
>
> Moreover, no one disputes that the discharge of fill into "isolated" waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations. Nor does petitioner dispute that the particular waters it seeks to fill are home to many important species of migratory birds, including the second-largest breeding colony of Great Blue Herons in northeastern Illinois, and several species of waterfowl protected by international treaty and Illinois endangered species laws.
>
> The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. Moreover, the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in Missouri v. Holland, the federal interest in protecting these birds is of "the first magnitude." Because of their transitory nature, they "can be protected only by national action."

During the last few years of the Rehnquist Court, two challenges to federal laws as exceeding the scope of the commerce power were rejected. One, Pierce County, Washington v. Guillen, was unanimous and did not engender controversy. The other, Gonzales v. Raich, was enormously controversial and led some commentators to argue that the Court was shifting away from significant limits on Congress's commerce power.

In Pierce County, Washington v. Guillen, 537 U.S. 129 (2003), the Court unanimously reaffirmed broad authority for Congress to legislate concerning road safety as part of its power to regulate the channels of interstate commerce. A federal statute provides that if a local government does

a traffic study as part of applying for federal funds, that study is not discoverable. Congress's concern was that local governments would refrain from conducting such investigations if they could be used as evidence against them in suits arising from automobile accidents.

Guillen involved two separate accidents at intersections in the state of Washington, and the local governments had recently conducted studies of traffic conditions at both locations. The plaintiffs sued the local governments and sought access to the traffic studies. The Washington Supreme Court declared unconstitutional the federal law that exempted these studies from discovery. The U.S. Supreme Court, in an opinion by Justice Clarence Thomas, unanimously reversed and upheld the federal law. Justice Thomas explained that "[i]t is well established that the Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce. . . . [The statutes] can be viewed as legislation aimed at improving safety in the channels of interstate commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress' Commerce Clause power."

GONZALES v. RAICH

545 U.S. 1 (2005)

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician

believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondents brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.

II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs." As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[Subsequently, Congress enacted the CSA and] Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping.

In enacting the CSA, Congress classified marijuana as a Schedule I drug. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.

III

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in United States v. Lopez, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, e.g., Wickard v. Filburn (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

Our decision in *Wickard* is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. *Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in

their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[30]

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. §801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const., Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly. Those two cases, of course, are United States v. Lopez (1995) and United States v. Morrison (2000). As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

V

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence

of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.

Justice SCALIA, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since Perez v. United States (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce" is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at

home and possessed for personal use is never more than an instant from the interstate market —and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market.

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents.

Justice O'Connor, with whom The Chief Justice and Justice Thomas join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. United States v. Lopez (1995). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility 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) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez* and *Morrison*. Accordingly I dissent.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones

was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,” the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as “transfer or possession of a firearm anywhere in the nation”—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today’s decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a new interstate scheme exclusively for the sake of reaching intrastate activity. I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

Even if intrastate cultivation and possession of marijuana for one’s own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court’s definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court’s opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates—the Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of “substantial effects” at issue (i.e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress’ excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment’s explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. The Government does cite one estimate that there were over 100,000 Compassionate Use Act users in California in 2004, but does not explain, in terms of proportions, what their presence means for the national illicit drug market.

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

As I explained at length in United States v. Lopez (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture.

Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for

value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens.

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b. Does the Tenth Amendment Limit Congress's Authority?

The first indication of the revival of the Tenth Amendment occurred in Gregory v. Ashcroft, 501 U.S. 452 (1991). State court judges in Missouri challenged a provision of the Missouri Constitution that set a mandatory retirement age as violating the federal Age Discrimination in Employment Act. The Supreme Court held that a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply. The Court did not use the Tenth Amendment to invalidate the federal law on its face or as applied. Instead, the Court used the Tenth Amendment and federalism considerations as a rule of construction. The Court ruled that a federal law that imposes a substantial burden on a state government will be applied only if Congress clearly indicated that it wanted the law to apply. The Age Discrimination in Employment Act lacks such a clear statement, and hence the Court refused to apply it to preempt the Missouri mandatory retirement age. Justice O'Connor, writing for the Court, discussed the importance of autonomous state governments as a check on possible federal tyranny and stressed the significance of the Tenth Amendment as a constitutional protector of state sovereignty.

There have been four decisions following Gregory v. Ashcroft that considered whether a federal law violates the Tenth Amendment. In three—New York v. United States, Printz v. United States, and Murphy v. National Collegiate Athletic Association—the Court found a violation of the Tenth Amendment. One—Reno v. Condon—rejected the challenge and upheld the federal law. These cases are presented in chronological order below. In focusing on them, and especially in

comparing the two most recent cases—Reno v. Condon and Murphy v. NCAA—it is important to focus on whether there is a meaningful distinction between them.

NEW YORK v. UNITED STATES

505 U.S. 144 (1992)

Justice O'CONNOR delivered the opinion of the Court.

These cases implicate one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In these cases, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.

I

We live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year.

p. 217

The 1985 Act was based largely on a proposal submitted by the National Governors' Association. The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders. [The Court described the first two as monetary incentives to encourage opening waste sites and access incentives, allowing states without sites to be denied access to other states' sites. The focus of the case is on the third type of incentive.]

The take title provision. The third type of incentive is the most severe. The Act provides:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

II

a

The task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.

These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, e.g., Perez v. United States (1971); McCulloch v. Maryland (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, e.g., Garcia v. San Antonio Metropolitan Transit Authority (1985). In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

b

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress's authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.

This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

1

As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions.

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the framers. In providing for a stronger central government, therefore, the framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

2

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress's spending power, "Congress may attach conditions on the receipt of federal funds." South Dakota v. Dole (1986). Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes. These include the Clean Water Act; the Occupational Safety and Health Act of 1970; the Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act.

By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

III

[The Court upheld the monetary and access incentives created by Congress for states to open waste sites. The Court found that the former was permissible as an exercise of the spending power. The Court found the second was permissible under Congress's authority to encourage compacts among the states.]

The take title provision is of a different character. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress's direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," Hodel v.

Virginia Surface Mining & Reclamation Assn., Inc., an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

Respondents emphasize the latitude given to the States to implement Congress's plan. The Act enables the States to regulate pursuant to Congress's instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

The United States argues that the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. But whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

The sited state respondents focus their attention on the process by which the Act was formulated. They correctly observe that public officials representing the State of New York lent their support to the Act's enactment. Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Gregory v. Ashcroft (1991).

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment. State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.

Justice WHITE, with whom Justice BLACKMUN and Justice STEVENS join, concurring in part and dissenting in part.

The Court today affirms the constitutionality of two facets of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act). These provisions include the monetary incentives from surcharges collected by States with low-level radioactive waste storage sites, and the "access incentives," which deny access to disposal sites for States that fail to meet certain deadlines for low-level radioactive waste disposal management. The Court strikes down and severs a third component of the 1985 Act, the "take title" provision, which requires a noncomplying State to take title to or to assume liability for its low-level radioactive waste if it fails to provide for the disposal of such waste by January 1, 1996. The Court deems this last provision unconstitutional under principles of federalism. Because I believe the Court has mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision, I respectfully dissent from [this aspect] of its opinion.

I

My disagreement with the Court's analysis begins at the basic descriptive level of how the legislation at issue in these cases came to be enacted. The Court goes some way toward setting out the bare facts, but its omissions cast the statutory context of the take title provision in the wrong light. To read the Court's version of events, one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), and its amendatory 1985 Act, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste

problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached.

The two signal events in 1979 that precipitated movement toward legislation were the temporary closing of the Nevada disposal site in July 1979, after several serious transportation-related incidents, and the temporary shutting of the Washington disposal site because of similar transportation and packaging problems in October 1979. At that time the facility in Barnwell, South Carolina, received approximately three-quarters of the Nation's low-level radioactive waste, and the Governor ordered a 50 percent reduction in the amount his State's plant would accept for disposal. The Governor of Washington threatened to shut down the Hanford, Washington, facility entirely by 1982 unless "some meaningful progress occurs toward" development of regional solutions to the waste disposal problem. Only three sites existed in the country for the disposal of low-level radioactive waste, and the "sited" States confronted the undesirable alternatives either of continuing to be the dumping grounds for the entire Nation's low-level waste or of eliminating or reducing in a constitutional manner the amount of waste accepted for disposal.

The imminence of a crisis in low-level radioactive waste management cannot be overstated. Accordingly, the National Governors' Association Task Force urged that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to the low-level waste disposal problem."

A movement thus arose to achieve a compromise between the sited and the unsited States, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States' assurances that they would develop alternative disposal facilities. The bill that in large measure became the 1985 Act "represent[ed] the diligent negotiating undertaken by" the National Governors' Association and "embodied" the "fundamentals of their settlement."

Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

II

Even were New York not to be estopped from challenging the take title provision's constitutionality, I am convinced that, seen as a term of an agreement entered into between the several States, this measure proves to be less constitutionally odious than the Court opines. First, the practical effect of New York's position is that because it is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, other States with such plants must accept New York's waste, whether they wish to or not. Otherwise, the many economically and socially beneficial producers of such waste in the State would have to cease their operations. The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by it being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.

Moreover, it is utterly reasonable that, in crafting a delicate compromise between the three overburdened States that provided low-level radioactive waste disposal facilities and the rest of the States, Congress would have to ratify some punitive measure as the ultimate sanction for noncompliance. The take title provision, though surely onerous, does not take effect if the generator of the waste does not request such action, or if the State lives up to its bargain of providing a waste disposal facility either within the State or in another State pursuant to a regional compact arrangement or a separate contract.

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III

The Court announces that it has no occasion to revisit such decisions as Gregory v. Ashcroft (1991); South Carolina v. Baker (1988); Garcia v. San Antonio Metropolitan Transit Authority (1985); EEOC v. Wyoming (1983); and National League of Cities v. Usery (1976). Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is unpersuasive. I have several difficulties with the Court's analysis in this respect: It builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality.

The Court's distinction between a federal statute's regulation of States and private parties for general purposes, as opposed to a regulation solely on the activities of States, is unsupported by our recent Tenth Amendment cases. In no case has the Court rested its holding on such a distinction. Moreover, the Court makes no effort to explain why this purported distinction should affect the analysis of Congress's power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible theory. An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.

Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congressional statutes that impose clear directives on state officials, including those enacted pursuant to the Extradition Clause, see, e.g., Puerto Rico v. Branstad (1987), the post-Civil War Amendments, see, e.g., South Carolina v. Katzenbach (1966), as well as congressional statutes that require state courts to hear certain actions, see, e.g., Testa v. Katt (1947).

IV

Though I disagree with the Court's conclusion that the take title provision is unconstitutional, I do not read its opinion to preclude Congress from adopting a similar measure through its powers under the Spending or Commerce Clauses. The Court makes clear that its objection is to the alleged "commandeer[ing]" quality of the take title provision. The spending power offers a means of enacting a take title provision under the Court's standards. Congress could, in other words, condition the payment of funds on the State's willingness to take title if it has not already provided a waste disposal facility.

p. 225

Similarly, should a State fail to establish a waste disposal facility by the appointed deadline (under the statute as presently drafted, January 1, 1996) Congress has the power pursuant to the Commerce Clause to regulate directly the producers of the waste. Thus, as I read it, Congress could amend the statute to say that if a State fails to meet the January 1, 1996, deadline for achieving a means of waste disposal, and has not taken title to the waste, no low-level radioactive waste may be shipped out of the State of New York. This background suggests that the threat of federal pre-emption may suffice to induce States to accept responsibility for failing to meet critical time deadlines for solving their low-level radioactive waste disposal problems, especially if that federal intervention also would strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities. And should Congress amend the statute to meet the Court's objection and a State refuse to act, the National Legislature will have ensured at least a federal solution to the waste management problem.

Finally, our precedents leave open the possibility that Congress may create federal rights of action in the generators of low-level radioactive waste against persons acting under color of state law for their failure to meet certain functions designated in federal-state programs.

V

The ultimate irony of the decision today is that in its formalistically rigid obeisance to "federalism," the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. Because the Court's justifications for undertaking this step are unpersuasive to me, I respectfully dissent.

Justice STEVENS, concurring in part and dissenting in part.

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. Because that indirect exercise of federal power proved ineffective, the framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.

The notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress," is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment surely does not impose any limit on Congress's exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.

PRINTZ v. UNITED STATES

521 U.S. 898 (1997)

Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

I

The Gun Control Act of 1968 (GCA), establishes a detailed federal scheme governing the distribution of firearms. In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background check system by November 30, 1998, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, [state and local law enforcement personnel must do background checks before issuing permit for firearms].

Petitioners Jay Printz and Richard Mack, the chief law enforcement officers [CLEOs] for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions.

II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

The petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws." The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and

weighty evidence' of the Constitution's meaning," Bowsher v. Synar (1986). Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions." Myers v. United States (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, and to register aliens seeking naturalization and issue certificates of registry. It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings.

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. [W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power.

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789—the day before its proposal of the Bill of Rights, see 1 Annals of Congress 912-913—the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.

To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. For deciding the issue before us here, they are of little relevance. Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text.

III

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," a principle that controls the present cases.

a

It is incontestible that the Constitution established a system of "dual sovereignty." Gregory v. Ashcroft (1991). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39 (J. Madison). This is reflected throughout the Constitution's text. Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109.

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

b

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, §3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees), Art. II, §2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could

act as effectively without the President as with him, by simply requiring state officers to execute its laws.

IV

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in New York v. United States (1992) were the so-called "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of the waste. We concluded that Congress could constitutionally require the States to do neither. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program."

The Government contends that New York is distinguishable on the following ground: unlike the "take title" provisions invalidated there, the background-check provision of the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs.

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law-enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check?

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than by "reduc[ing] [them] to puppets of a ventriloquist Congress." It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." Assuming all the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: "The Federal Government may not compel the States to enact or administer a federal regulatory program." The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

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

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in New York v. United States (1992). Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the framers of the Constitution, whether the Congress could require state agents to collect federal taxes. Or the question whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

p. 231

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. And Congress's

view of the matter is quite different from that implied by the Court today.

The Brady Act was passed in response to what Congress described as an "epidemic of gun violence." H. Rep. No. 103-344, 103rd Cong. 1st Sess. 1985. The Act's legislative history notes that 15,377 Americans were murdered with firearms in 1992, and that 12,489 of these deaths were caused by handguns. Congress expressed special concern that "[t]he level of firearm violence in this country is, by far, the highest among developed nations." The partial solution contained in the Brady Act, a mandatory background check before a handgun may be purchased, has met with remarkable success. Between 1994 and 1996, approximately 6,600 firearm sales each month to potentially dangerous persons were prevented by Brady Act checks; over 70% of the rejected purchasers were convicted or indicted felons. Whether or not the evaluation reflected in the enactment of the Brady Act is correct as to the extent of the danger and the efficacy of the legislation, the congressional decision surely warrants more respect than it is accorded in today's unprecedented decision.

I

The text of the Constitution provides a sufficient basis for a correct disposition of this case. Article I, §8, grants the Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by Justice Thomas, there can be no question that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language that plainly refers only to powers that are "not" delegated to Congress, it provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

II

Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign states, but it had no authority to govern individuals directly. Thus, it raised an army and financed its operations by issuing requisitions to the constituent members of the Confederacy, rather than by creating federal agencies to draft soldiers or to impose taxes.

That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. The basic change in the character of the government that the framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers.

Indeed, the historical materials strongly suggest that the Founders intended to enhance the capacity of the federal government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." The Federalist No. 27, at 180. Hamilton's meaning was unambiguous; the federal government was to have the power to demand that local officials implement national policy programs.

More specifically, during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the federal government. The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies . . . Congress could impose these responsibilities without the consent of the States." No fair reading of these materials can justify such an interpretation. As Hamilton explained, the power of the government to act on "individual citizens"—including "employ[ing] the ordinary magistracy" of the States—was an answer to the problems faced by a central government that could act only directly "upon the States in their political or collective capacities." The Federalist, No. 27.

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions, is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. The majority's description of these early statutes is both incomplete and at times misleading.

III

The Court's "structural" arguments are not sufficient to rebut that presumption. The fact that the framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, creating state emergency response commissions designed to manage the release of hazardous substances, collecting and reporting data on underground storage tanks that may pose an environmental hazard, and reporting traffic fatalities, and missing children, to a federal agency.

As we explained in Garcia v. San Antonio Metropolitan Transit Authority (1985): "[T]he principal means chosen by the framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from

time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Recent developments demonstrate that the political safeguards protecting Our Federalism are effective. The majority expresses special concern that were its rule not adopted the Federal Government would be able to avail itself of the services of state government officials "at no cost to itself." But this specific problem of federal actions that have the effect of imposing so-called "unfunded mandates" on the States has been identified and meaningfully addressed by Congress in recent legislation. See Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48.

Nor is there force to the assumption undergirding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse. These cases do not involve any mandate to state legislatures to enact new rules. When legislative action, or even administrative rulemaking, is at issue, it may be appropriate for Congress either to pre-empt the State's lawmaking power and fashion the federal rule itself, or to respect the State's power to fashion its own rules. But this case, unlike any precedent in which the Court has held that Congress exceeded its powers, merely involves the imposition of modest duties on individual officers. The Court seems to accept the fact that Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon; indeed, the Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data. A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem.

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign state. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

RENO v. CONDON

528 U.S. 141 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

The Driver's Privacy Protection Act of 1994 (DPPA or Act) regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). We hold that in enacting this statute Congress did not run afoul of the federalism principles enunciated in New York v. United States (1992) and Printz v. United States (1997).

The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs. State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle

description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Congress found that many States, in turn, sell this personal information to individuals and businesses. These sales generate significant revenues for the States.

The DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent. The DPPA generally prohibits any state DMV, or officer, employee, or contractor thereof, from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, Social Security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status."

The DPPA's provisions do not apply solely to States. The Act also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV. The DPPA establishes several penalties to be imposed on States and private actors that fail to comply with its requirements.

South Carolina law conflicts with the DPPA's provisions. Under that law, the information contained in the State's DMV records is available to any person or entity that fills out a form listing the requester's name and address and stating that the information will not be used for telephone solicitation.

Following the DPPA's enactment, South Carolina and its Attorney General, respondent Condon, filed suit in the United States District Court for the District of South Carolina, alleging that the DPPA violates the Tenth and Eleventh Amendments to the United States Constitution.

We of course begin with the time-honored presumption that the DPPA is a "constitutional exercise of legislative power." The United States asserts that the DPPA is a proper exercise of Congress's authority to regulate interstate commerce under the Commerce Clause. The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA regulates is a "thin[g] in interstate commerce," and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. United States v. Lopez (1995). We agree with the United States' contention. The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

But the fact that drivers' personal information is, in the context of this case, an article in interstate commerce does not conclusively resolve the constitutionality of the DPPA. In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.

South Carolina contends that the DPPA violates the Tenth Amendment because it "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions," and thereby makes "state officials the unwilling implementors of federal policy." South Carolina emphasizes that the DPPA requires the State's employees to learn and apply the Act's substantive restrictions, which are summarized above, and notes that these activities will consume the employees' time and thus the State's resources. South Carolina further notes that the DPPA's penalty provisions hang over the States as a potential punishment should they fail to comply with the Act.

We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either *New York* or *Printz*. We think, instead, that this case is governed by our decision in South Carolina v. Baker (1988). In *Baker*, we upheld a statute that prohibited States from issuing unregistered bonds because the law "regulate[d] state activities," rather than "seek[ing] to control or influence the manner in which States regulate private parties." We further noted:

> Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

As a final matter, we turn to South Carolina's argument that the DPPA is unconstitutional because it regulates the States exclusively. The essence of South Carolina's argument is that Congress may only regulate the States by means of "generally applicable" laws, or laws that apply to individuals as well as States. But we need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.

MURPHY v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

138 S. Ct. 1461 (2018)

Justice ALITO delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it

unlawful for a State to "authorize" sports gambling schemes. We must decide whether this provision is compatible with the system of "dual sovereignty" embodied in the Constitution.

I

Sports gambling has long had strong opposition. Opponents argue that it is particularly addictive and especially attractive to young people with a strong interest in sports, and in the past gamblers corrupted and seriously damaged the reputation of professional and amateur sports. Apprehensive about the potential effects of sports gambling, professional sports leagues and the National Collegiate Athletic Association (NCAA) long opposed legalization.

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling, and this sparked federal efforts to stem the tide. Opponents of sports gambling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). PASPA's proponents argued that it would protect young people, and one of the bill's sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports.

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. §3702(1). In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes—but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government). Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations.

At the time of PASPA's adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos, and three States hosted sports lotteries or allowed sports pools. PASPA contains "grand-father" provisions allowing these activities to continue. Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's effective date.

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling, and in 2012 the legislature enacted a law doing just that.

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. [The New Jersey law was struck down.]

[T]he New Jersey Legislature enacted the law now before us. The 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling. Instead, it is framed as a repealer. Specifically, it repeals the

provisions of state law prohibiting sports gambling insofar as they concerned the "placement and acceptance of wagers" on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City. The new law also specified that the repeal was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State.

Predictably, the same plaintiffs promptly commenced a new action in federal court. They won in the District Court, and the case was eventually heard by the Third Circuit sitting en banc. The en banc court affirmed, finding that the new law, no less than the old one, violated PASPA by "author[izing]" sports gambling.

II

Before considering the constitutionality of the PASPA provision prohibiting States from "author[izing]" sports gambling, we first examine its meaning. The parties advance dueling interpretations, and this dispute has an important bearing on the constitutional issue that we must decide. Neither respondents nor the United States, appearing as an *amicus* in support of respondents, contends that the provision at issue would be constitutional if petitioners' interpretation is correct. Indeed, the United States expressly concedes that the provision is unconstitutional if it means what petitioners claim.

Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. One of the accepted meanings of the term "authorize," they point out, is "permit." They therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization.

Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. To authorize, they maintain, means "'[t]o empower; to give a right or authority to act; to endow with authority.'" And this, they say, is precisely what the 2014 Act does: It empowers a defined group of entities, and it endows them with the authority to conduct sports gambling operations. Respondents do not take the position that PASPA bans all modifications of old laws against sports gambling, but just how far they think a modification could go is not clear.

In our view, petitioners' interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. This is clear when the state-law landscape at the time of PASPA's enactment is taken into account. At that time, all forms of sports gambling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only "permits" sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' and the United States's definition).

The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.

III

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all . . . Acts and Things which Independent States may of right do." The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty." Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty."

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways.

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here. First, the rule serves as "one of the Constitution's structural protections of liberty." "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities." "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." "'[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'"

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.

IV

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct

control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter.

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

V

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides "a rule of decision." It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," the PASPA provision at issue must be best read as one that regulates private actors.

In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States. Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, §3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate [s] state governments' regulation" of their citizens. The Constitution gives Congress no such power.

D. THE TAXING AND SPENDING POWER

Article I, §8 states that "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." Under the Articles of Confederation, the limited federal government had no taxing power and therefore no revenue to spend. Obviously, in the twenty-first century, the power to tax and spend is one of the most important of all Congressional powers.

FOR WHAT PURPOSES MAY CONGRESS TAX AND SPEND?

A basic question concerns the purposes for which Congress may tax and spend. Is Congress limited to taxing and spending only to carry out other powers specifically enumerated in Article I, or does Congress have broad authority to tax and spend for the general welfare? The Court adopted the latter, much more expansive view in United States v. Butler, below.

In reading *Butler*, it is important to distinguish two issues: the scope of Congress's taxing and spending power, and whether the Tenth Amendment is a limit on it. *Butler*'s holding as to the former remains good law, but its ruling as to the Tenth Amendment is no longer followed.

UNITED STATES v. BUTLER

297 U.S. 1 (1936)

Justice ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, conflict with the Federal Constitution. [The Agricultural Adjustment Act declared that because of a crisis in agricultural production, the Secretary of Agriculture, among other powers, could set limits on production of certain crops and impose taxes on production in excess of these limits. The Act also authorized grants to farmers to control production and thus regulate prices.]

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

Article 1, §8, of the Constitution, vests sundry powers in the Congress. The clause thought to authorize the legislation, the first, confers upon the Congress 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." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general

welfare. The government concedes that the phrase “to provide for the general welfare” qualifies the power “to lay and collect taxes.”

The Congress is expressly empowered to lay taxes to provide for the general welfare. Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated and is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations. We are not now required to ascertain the scope of the phrase “general welfare of the United States” or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural [A]djustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states’ reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard.

Subsequent cases affirmed Congress's expansive authority under the taxing and spending clauses.

CHAS. C. STEWARD MACH. CO. v. DAVIS, 301 U.S. 548 (1937): Justice CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment.

We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. But in truth other excises were known, and known since early times.

The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary.

The subject-matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises." Article 1, §8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the Legislatures of the states, has been denied by the Constitution to the Congress of the nation.

In other cases, the Court construed the spending power broadly in upholding other aspects of the Social Security Act. In Helvering v. Davis, 301 U.S. 619 (1937), the Court upheld the provisions of the Social Security Act that provide for an old-age pension program. In both cases, the Court emphasized the broad scope of Congress's spending power.

Many commentators have speculated that the Rehnquist Court's revival of federalism as a limit on federal powers would cause it to restrict the scope of Congress's spending power. Although this still may occur, it has not yet taken place and, in Sabri v. United States, the Court reaffirmed a broad scope for Congress's authority under the spending clause.

SABRI v. UNITED STATES

541 U.S. 600 (2004)

Justice SOUTER delivered the opinion of the Court.

The question is whether 18 U.S.C. §666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution. We hold that it is.

I

Petitioner Basim Omar Sabri is a real estate developer who proposed to build a hotel and retail structure in the city of Minneapolis. Sabri lacked confidence, however, in his ability to adapt to the lawful administration of licensing and zoning laws, and offered three separate bribes to a city councilman, Brian Herron, according to the grand jury indictment that gave rise to this case. At the time the bribes were allegedly offered (between July 2, 2001, and July 17, 2001), Herron served as a member of the Board of Commissioners of the Minneapolis Community Development Agency (MCDA), a public body created by the city council to fund housing and economic development within the city.

The charges were brought under 18 U.S.C. §666(a)(2), which imposes federal criminal penalties on anyone who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." For criminal liability to lie, the statute requires that "the organization, government, or agency receiv[e], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." In 2001, the City Council of Minneapolis administered about $29 million in federal funds paid to the city, and in the same period, the MCDA received some $23 million of federal money.

II

Sabri raises what he calls a facial challenge to §666(a)(2): the law can never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money. It is fatal, as he sees it, that the statute does not make the link an element of the crime, to be charged in the indictment and demonstrated beyond a reasonable doubt.

We can readily dispose of this position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense. We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I, §8.

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, §8, cl. 1, and it has corresponding authority under the Necessary and

Proper Clause, Art. I, §8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. See generally McCulloch v. Maryland (1819). Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity. Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars.

It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by §666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers. It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here, and on a bribe that goes well beyond liquor and cigars.

CONDITIONS ON GRANTS TO STATE GOVERNMENTS

One important issue concerning the spending power concerns the ability of Congress to place conditions on grants to state and local governments. The Court has held that Congress may place strings on such grants, as long as the conditions are expressly stated and as long as they have some relationship to the purpose of the spending program.

In Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947), the Court upheld a provision of the federal Hatch Act which granted federal funds to state governments on the condition that the states adopt civil service systems and limit the political activities of many categories of government workers. The Court explained that Congress has broad power to set conditions for the receipt of federal funds even as to areas that Congress might otherwise not be able to regulate. The Court stated: “While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.”

In South Dakota v. Dole, the Court upheld conditions on grants to state and local governments but also explained the conditions that must be met.

SOUTH DAKOTA v. DOLE

483 U.S. 203 (1987)

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. In 1984 Congress enacted 23 U.S.C. §158, which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that §158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."

The spending power is of course not unlimited, Pennhurst State School and Hospital v. Halderman (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

South Dakota does not seriously claim that §158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.

We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under

specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.

Justice BRENNAN, dissenting.

I agree with Justice O'Connor that regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment. Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority. I therefore dissent.

Justice O'CONNOR, dissenting.

The Court today upholds the National Minimum Drinking Age Amendment, as a valid exercise of the spending power conferred by Article I, §8. But §158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress's power to regulate commerce because it falls within the ambit of §2 of the Twenty-first Amendment.

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs."

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports, §158.

Both the majority and the dissent in South Dakota v. Dole discuss Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), in which the Supreme Court held that Congress may place strings on grants to state and local governments as long as the conditions are expressly

stated. The Developmentally Disabled Assistance and Bill of Rights Act of 1975 created a federal grant program for state governments to provide for better care for the developmentally disabled. The act included a "bill of rights" for the developmentally disabled. The Pennhurst State School and Hospital, a facility run by the State of Pennsylvania, was sued for violating the bill of rights contained in the act.

The Court ruled in favor of the state, holding that "if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously." The Court explained that conditions must be clearly stated so that states will know the consequences of their choosing to take federal funds. The Court concluded that the act failed to require that states meet the bill of rights as a condition for accepting federal money.

In National Federation of Independent Business v. Sebelius, presented above, the Court for the first time found conditions on federal spending to be unconstitutional as unduly coercive.

E. CONGRESS'S POWERS UNDER THE POST-CIVIL WAR AMENDMENTS

After the Civil War, three extremely important amendments were added to the Constitution. The Thirteenth Amendment, adopted in 1865, prohibits slavery and involuntary servitude, except as a punishment for a crime, and also provides in §2, "Congress shall have power to enforce this article by appropriate legislation." The Fourteenth Amendment, adopted in 1868, provides that all persons born or naturalized in the United States are citizens and that no state can abridge the privileges or immunities of such citizens; nor may states deprive any person of life, liberty, or property without due process of law or deny any person of equal protection of the laws. Section 5 of the Fourteenth Amendment states, "[T]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 again provides that Congress has the power to enforce it by appropriate legislation.

The three Reconstruction-era amendments thus contain provisions that empower Congress to enact civil rights legislation. Two major questions arise concerning the scope of this power. First, may Congress regulate private conduct under this authority, or is Congress limited to regulating only government actions? Second, what is the scope of Congress's power under these amendments?

1. Whom May Congress Regulate Under the Post-Civil War Amendments?

In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that Congress, pursuant to §2 of the Thirteenth Amendment and §5 of the Fourteenth Amendment, may regulate only state and local government actions, not private conduct.[31] The Civil Rights Act of 1875 provided that all persons were "entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and

applicable to citizens of every race and color, regardless of any previous condition of servitude." In other words, the law broadly prohibited private racial discrimination by hotels, restaurants, transportation, and other public accommodations.

By an eight-to-one decision, the Court held that the act was unconstitutional and adopted a restrictive view as to the power of Congress to use these provisions to regulate private behavior. As to the Thirteenth Amendment, the Court recognized that it applies to private conduct; it prohibits people from being or owning slaves. The Court, however, said that Congress's power was limited to ensuring an end to slavery; Congress could not use this power to eliminate discrimination. The Court explained that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." Indeed, the Court stated that Congress could abolish "all badges and incidents of slavery," but it could not use its power under the Thirteenth Amendment to "adjust what may be called the social rights of men and races in the community."

The Court, writing less than 20 years after the Civil War, said that slavery was a thing of the past and that there was little need for civil rights legislation to protect blacks. Justice Bradley, writing for the Court, stated, "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."

The Court also held that Congress lacked the authority to enact the law under the Fourteenth Amendment. In fact, the Court broadly declared that the Fourteenth Amendment only applies to government action and that therefore it cannot be used by Congress to regulate private behavior. The Court stated that "the fourteenth amendment is prohibitory . . . upon the states. [Individual] invasion of individual rights is not the subject matter of the amendment." The Court made it clear that Congress's authority was only over state and local governments and their officials, not over private conduct: "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 actions of State officers."

Now, however, it is well established that Congress, pursuant to §2 of the Thirteenth Amendment, may prohibit private racial discrimination. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that Congress could prohibit private discrimination in selling and leasing property. The case involved a private real estate developer who refused to sell housing or land to African Americans. An African American couple sued under 42 U.S.C. §1982, which provides that all citizens have "the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

The Court held that §1982 applies to prohibit private discrimination and that Congress had the authority under the Thirteenth Amendment to adopt the law. The Court said that Congress has broad legislative power under the Thirteenth Amendment: "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."

Similarly, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court held that 42 U.S.C. §1981 applies to prohibit discrimination in private contracting and that this is within the scope of Congress's power under §2 of the Thirteenth Amendment. Section 1981 provides that "[a]ll 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." *Runyon* raised the question of whether §1981 prohibits private schools from excluding qualified African American children solely because of their race.

The Supreme Court saw no basis for distinguishing Jones v. Alfred H. Mayer Co. and concluded "that §1981, like §1982, reaches private conduct." The Court unanimously reaffirmed this conclusion in 1989 in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

However, the Supreme Court subsequently reaffirmed that Congress cannot regulate private behavior under the Fourteenth Amendment. In United States v. Guest, 383 U.S. 745 (1966), five Justices, although not in a single opinion, concluded that Congress may outlaw private discrimination pursuant to §5 of the Fourteenth Amendment. *Guest* involved the federal law that makes it a crime for two or more persons to go "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege." 18 U.S.C. §241. The Court held that interference with the use of facilities in interstate commerce violated the law, whether or not motivated by a racial animus.

The majority opinion did not reach the question of whether Congress could regulate private conduct under §5 of the Fourteenth Amendment. However, six of the justices—three in a concurring opinion and three in a dissenting opinion—expressed the view that Congress could prohibit private discrimination under its §5 powers. Justice Tom Clark, in a concurring opinion joined by Justices Hugo Black and Abe Fortas, said that "the specific language of §5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Likewise, Justice William Brennan in an opinion that concurred in part and dissented in part, and that was joined by Chief Justice Earl Warren and Justice William Douglas, concluded that Congress may prohibit private discrimination pursuant to §5. However, the Supreme Court later overruled *Guest* and held that Congress cannot regulate private behavior under §5.

UNITED STATES v. MORRISON

529 U.S. 598 (2000)

[The case is presented above in connection with the Commerce Clause. The issue is the constitutionality of the civil damages provision of the Violence Against Women Act. The case involves a woman who, while a freshman at Virginia Tech University, was allegedly raped by football players. She sued under the civil remedies provision of the act. In the first part of the majority opinion, the Court held that it exceeded the scope of Congress's Commerce Clause authority.[32] In the alternative, the government argued that the law was constitutional as an exercise of Congress's power under §5 of the Fourteenth Amendment.]

Chief Justice REHNQUIST delivered the opinion of the Court:

Because we conclude that the Commerce Clause does not provide Congress with authority to enact §13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress's remedial power under §5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact §13981.

Petitioners' §5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record.

The principles governing an analysis of congressional legislation under §5 are well settled. [T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the framers' carefully crafted balance of power between the States and the National Government.

Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, United States v. Harris (1883), and the *Civil Rights Cases* (1883). We concluded that th[e] law[s] exceeded Congress's §5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners rely on United States v. Guest (1966), for the proposition that the rule laid down in the *Civil Rights Cases* is no longer good law. In *Guest*, the Court reversed the construction of an indictment under 18 U.S.C. §241, saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." Three Members of the Court, in a separate opinion by Justice Brennan, expressed the view that the *Civil Rights Cases* were wrongly decided, and that Congress could under §5 prohibit actions by private individuals. Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could "punis[h] all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."

Though these three Justices saw fit to opine on matters not before the Court in *Guest*, the Court had no occasion to revisit the *Civil Rights Cases* and *Harris*, having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contain[ed] an express allegation of state involvement."

Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias. In the present cases, for example, §13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the §5 remedies that we have previously upheld.

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress's effort in §13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under §5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.

Justice BREYER, dissenting.

Given my conclusion on the Commerce Clause question, I need not consider Congress's authority under §5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in United States v. Harris (1883), and the *Civil Rights Cases* (1883), the Court held that §5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of private persons. That is certainly so. The Federal Government's argument, however, is that Congress used §5 to remedy the actions of state actors, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "[l]egislation . . . [that] prohibits conduct which is not itself unconstitutional." It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?

Despite my doubts about the majority's §5 reasoning, I need not, and do not, answer the §5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

2. What Is the Scope of Congress's Power?

There are two different views as to the scope of Congress's power under the post-Civil War Amendments and particularly under §5 of the Fourteenth Amendment. One approach is narrow and accords Congress only authority to prevent or provide remedies for violations of rights

recognized by the Supreme Court; under this view, Congress cannot expand the scope of rights or provide additional rights. An alternative approach also accords Congress authority to interpret the Fourteenth Amendment to expand the scope of rights or even to create new rights. Under this view, Congress may create rights by statute where the Court has not found them in the Constitution, but Congress cannot dilute or diminish constitutional rights.

The choice between these two views is in part about a textual argument concerning what §5 means when it empowers Congress "to enforce" the amendment by appropriate legislation. Those who take the narrower view contend that Congress is not "enforcing" if it is creating new rights. But those who take the broader view argue that Congress is enforcing the amendment by creating greater protections than those found by the Court.

The dispute over these two views also is about the appropriate roles of the Court and Congress in deciding the substantive content of rights. Those who take the narrow position see it as solely the Court's role to decide the rights protected under the Constitution; Congress's role is limited to enacting laws to prevent and remedy violations. But those who adopt the broader view of Congress's §5 power see both Congress and the Court as having authority to recognize and protect rights under the Constitution.

As with all of the material in this chapter, there also is an important underlying issue concerning the allocation of power between the federal and state governments. Advocates of the narrow view see it as limiting federal power, reserving more governance for the states, and lessening the instances in which the federal government can regulate state and local actions. In contrast, supporters of the broader approach defend it as creating needed national power to protect civil rights and civil liberties.

In Katzenbach v. Morgan, the first case presented, the Court seemed to adopt the broader approach and accord Congress expansive authority under §5 of the Fourteenth Amendment. In subsequent cases, City of Boerne v. Flores, and Shelby County, Alabama v. Holder, the Court clearly chose the narrow view and limited Congress's power under §5.

KATZENBACH v. MORGAN & MORGAN

384 U.S. 641 (1966)

Justice BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of §4(e) of the Voting Rights Act of 1965. That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of §4(e) insofar as it pro tanto prohibits the enforcement of the election laws of New York requiring an ability to read and write English as a condition of voting.

The Attorney General of the State of New York argues that an exercise of congressional power under §5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of

the Amendment that Congress sought to enforce. More specifically, he urges that §4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by §4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of §5 supports such a construction. A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of §1 of the Amendment.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in Lassiter v. Northampton County Bd. of Election, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under §5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by §5, appropriate legislation to enforce the Equal Protection Clause.

By including §5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, §8, cl. 18. We therefore proceed to the consideration whether §4(e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the McCulloch v. Maryland standard, whether §4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the [C]onstitution."[33]

There can be no doubt that §4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted §4(e) "to secure the rights under the [F]ourteenth [A]mendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, §4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4(e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of §4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the

entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support §4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.

Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, to which it brought a specially informed legislative competence, it was Congress's prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

We therefore conclude that §4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is reversed.

Justice HARLAN, whom Justice STEWART joins, dissenting.

Worthy as its purposes may be thought by many, I do not see how §4(e) of the Voting Rights Act of 1965, can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers only in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, e.g., the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments, and, as more recently decided, to the general principles of the Fourteenth Amendment.

In 1959, in Lassiter v. Northampton Election Bd., this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since §5 of the Fourteenth Amendment gives to the Congress power to "enforce" the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any

congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although §5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, I believe the Court has confused the issue of how much enforcement power Congress possesses under §5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by §5 to take appropriate remedial measures to redress and prevent the wrongs. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the §5 power into play at all.

Section 4(e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter*, that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by §4(e). In effect the Court reads §5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of §5, then I do not see why Congress should not be able as well to exercise its §5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress's exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that §4(e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere ipse dixit can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

In City of Boerne v. Flores, the Court adopted a very different view of the scope of Congress's authority under §5 of the Fourteenth Amendment than that taken by a majority in *Katzenbach*. To understand *City of Boerne*, which follows, a bit of background is necessary. In Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Supreme Court significantly narrowed the scope of the Free Exercise Clause.[34] Oregon law prohibited the

consumption of peyote, a hallucinogenic substance. Native Americans challenged this law claiming that it infringed free exercise of religion because their religious rituals required the use of peyote. Under prior Supreme Court precedents, government actions burdening religion are upheld only if they are necessary to achieve a compelling government purpose. The Supreme Court, in *Smith*, changed the law and held that the Free Exercise Clause cannot be used to challenge neutral laws of general applicability. The Oregon law prohibiting consumption of peyote was deemed neutral because it was not motivated by a desire to interfere with religion and it was a law of general applicability.

In response to this decision, in 1993, Congress overwhelmingly adopted the Religious Freedom Restoration Act, which was signed into law by President Clinton. The Religious Freedom Restoration Act was express in stating that its goal was to overturn *Smith* and restore the test that was followed before that decision. The act requires courts considering free exercise challenges, including to neutral laws of general applicability, to uphold the government's actions only if they are necessary to achieve a compelling purpose. In City of Boerne v. Flores, the Court declared the Religious Freedom Restoration Act unconstitutional.

CITY OF BOERNE v. FLORES

521 U.S. 507 (1997)

Justice KENNEDY delivered the opinion of the Court.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA). The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress's power.

I

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the Commission must preapprove construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The Archbishop brought this suit challenging the permit denial in the United States District Court for the Western District of Texas. The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality. The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit.

II

Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith (1990). RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

III

a

The parties disagree over whether RFRA is a proper exercise of Congress's §5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

All must acknowledge that §5 is "a positive grant of legislative power" to Congress, Katzenbach v. Morgan (1966). Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." We have also concluded that other measures protecting voting rights are within Congress's power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States.

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." In assessing the breadth of §5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under §5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which §5 refers, include the Due Process Clause of the Fourteenth Amendment.

Congress's power under §5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

1

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress's enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft amendment to the House of Representatives on behalf of the Joint Committee: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

p. 260

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution.

Section 1 of the new draft Amendment imposed self-executing limits on the States. Section 5 prescribed that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Under the revised Amendment, Congress's power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft would give Congress "the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State." Representative Stevens described the new draft Amendment as "allow[ing] Congress to correct the unjust legislation of the States."

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." The power to interpret the Constitution in a case or controversy remains in the Judiciary.

2

The remedial and preventive nature of Congress's enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the Civil Rights Cases (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress's power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may

adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. . . .” Although the specific holdings of these early cases might have been superseded or modified, *see*, *e.g.*, Heart of Atlanta Motel, Inc. v. United States (1964); United States v. Guest (1966), their treatment of Congress’s §5 power as corrective or preventive, not definitional, has not been questioned.

3

Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Marbury v. Madison. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under §5 of the Fourteenth Amendment.

b

Respondent contends that RFRA is a proper exercise of Congress’s remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA’s restrictions apply to every agency and official of the Federal, State, and

local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion. The reach and scope of RFRA distinguish it from other measures passed under Congress's enforcement power, even in the area of voting rights.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. Marbury v. Madison. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

Justice O'Connor, with whom Justice Breyer joins except as to a portion of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress's power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Div., Dept. of Human Resources of Oregon v. Smith (1990), the decision that prompted Congress to enact RFRA, as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

The Voting Rights Act of 1965 is a landmark federal civil rights statute. Section 2 prohibits state and local governments from having election practices or systems that discriminate against minority voters. It authorizes litigation to enforce this prohibition. Congress believed that this was insufficient; voting rights litigation is expensive and time consuming. Also, Congress was aware that Southern states in particular kept changing their election systems to disenfranchise minority voters. Section 5 provides that jurisdictions with a history of race discrimination in voting must get "preclearance" from the Attorney General or a three-judge federal district court before changing their election systems. Section 4(B) defines those jurisdictions that must get preclearance.

In 2006, Congress extended these latter provisions for another 25 years. In Shelby County, Alabama v. Holder, the Court declared Section 4(B) unconstitutional on the grounds that it intruded on state sovereignty and did so based on data that was decades old. In reading the case, notice that the Court does not use the test from City of Boerne v. Flores. Also, it is worth focusing on what constitutional principle is violated by Section 4(B) of the Voting Rights Act.

SHELBY COUNTY, ALABAMA v. HOLDER

570 U.S. 529 (2013)

Chief Justice ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide." Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent.

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs."

I

a

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." The current version forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Both the Federal Government and individuals have sued to enforce §2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. §4(b). Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. A covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona.

In those jurisdictions, §4 of the Act banned all such tests or devices. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in §4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. That swept in several counties in California, New Hampshire, and New York. Congress also extended the ban in §4(a) on tests and devices nationwide.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout.

We upheld each of these reauthorizations against constitutional challenge. See Georgia v. United States (1973); City of Rome v. United States (1980); Lopez v. Monterey County (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act. Congress also amended §5 to prohibit more conduct than before. Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice."

b

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement.

II

In Northwest Austin Municipal District v. Holder (2009), we stated that "the Act imposes current burdens and must be justified by current needs." And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." These basic principles guide our review of the question before us.

a

The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art.VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the

Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

More specifically, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."

Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States. Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." Coyle v. Smith (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."

The Voting Rights Act sharply departs from these basic principles. It suspends "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a §2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation."

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government." As we reiterated in *Northwest Austin*, the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system."

b

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts

of our country for nearly a century." Several States had enacted a variety of requirements and tests "specifically designed to prevent" African-Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly percentage points or more below the figures for whites.

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary."

c

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices."

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. Congress also expanded the prohibitions in §5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down. Under this theory, however, §5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

a

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

b

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin*, and we make it clear again today.

c

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. Contrary to the dissent's contention,

we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Justice THOMAS, concurring.

I join the Court's opinion in full but write separately to explain that I would find §5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons. . . .

Today, our Nation has changed. "[T]he conditions that originally justified [§5] no longer characterize voting in the covered jurisdictions."

While the Court claims to "issue no holding on §5 itself," its own opinion compellingly demonstrates that Congress has failed to justify "current burdens" with a record demonstrating "current needs." By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find §5 unconstitutional.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In the Court's view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. In April

2006, the Senate followed suit, with hearings of its own. In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. President Bush signed it a week later.

In the long course of the legislative process, Congress "amassed a sizable record." The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed."

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation." In choosing this language, the Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland (1819).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin*, is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner.

For three reasons, legislation reauthorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld.

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA.

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime.

This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods."

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. On that score, the record before Congress was huge. In fact, Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory.

Congress also received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.

Conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding.

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs."

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 [and a half] years" he had served in the House. After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

The Federal Executive Power

This chapter examines the powers of the presidency and the executive branch. It particularly focuses on the tensions between the executive and legislative powers. The previous chapter examines the federal legislative power in relationship to state governments. This chapter, in contrast, centers on the relationship between two branches of the federal government.

Six topics are examined. First, section A focuses on the issue of inherent presidential power and the question of when, if at all, the president may act without constitutional or statutory authority. The issue of executive privilege is considered as an example of this controversy.

Second, section B considers the constitutional problems posed by administrative agencies. The section begins by considering the nondelegation doctrine and its demise and then examines the legislative veto as a possible alternative check on administrative agencies. In light of the demise of the legislative veto, the chapter then considers other alternative checks on agencies, including the use of the removal power.

Third, section C looks at the allocation of decision-making authority in the area of foreign policy. In particular, responsibilities with regard to treaties and war powers are

considered.

Fourth, section D examines executive power and the war on terrorism.

Fifth, section E looks at executive power with regard to immigration.

Finally, section F concludes by examining checks on the executive, including civil suits for money damages and impeachment.

A. INHERENT PRESIDENTIAL POWER

When, if ever, may the president act without express constitutional or statutory authorization? If the president has explicit constitutional authority for particular conduct, then the issues are solely whether the president is acting within the scope of the granted power and whether the president is violating some other constitutional provision. If there is a statute authorizing the president's conduct, then the question is whether that law is constitutional. But what if there is neither constitutional nor statutory authority?

The debate over this question began in the earliest days of the nation and had impeccable authorities on each side of the dispute. Early in the presidency of George Washington, Alexander Hamilton and James Madison clashed over this issue and whether the president could issue a neutrality proclamation as to a war occurring between England and France. Alexander Hamilton argued that the difference in the wording of Articles I and II reveals the framers' intention to create inherent presidential powers.[1] Article I initially states, "All legislative Powers herein granted shall be vested in a Congress of the United States." Article II of the Constitution begins, "The executive Power shall be vested in a President of the United States of America." Because Article II does not limit the president to powers "herein granted," Hamilton argued that the president has authority not specifically delineated in the Constitution.

Others, beginning with James Madison,[2] have disputed this interpretation of Article II, contending that the opening language of Article II was "simply to settle the question whether the executive branch should be plural or single and to give the executive a title."[3] According to this position, the president has no powers that are not enumerated in Article II and, indeed, such unenumerated authority would be inconsistent with a Constitution creating a government of limited authority.

The leading Supreme Court decision concerning this issue is Youngstown Sheet & Tube Co. v. Sawyer. In reading this decision, focus on how each of the opinions would answer the question of when the president may act without express constitutional or statutory authority. Following this case, a specific, important example is presented: When, if at all, may the president claim executive privilege?

YOUNGSTOWN SHEET & TUBE CO. v. SAWYER

343 U.S. 579 (1952)

Justice BLACK delivered the opinion of the Court.

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

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

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions.

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

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

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

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

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

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

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

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser

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

We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.

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

The clause on which the Government relies is that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Assuming that we are in a war de facto, whether it is or is not a war de jure, does that empower the Commander-in-Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. I suppose no one would doubt that Congress can take over war supply as a Government enterprise. On the other hand, if Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces, can the Executive because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.

The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Justice DOUGLAS, concurring.

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

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

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

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

The legislative nature of the action taken by the President seems to me to be clear. When the United States takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession.

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

Justice FRANKFURTER, concurring.

We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given. These and other questions, like or unlike, are not now here. I would exceed my authority were I to say anything about them.

The question before the Court comes in this setting. Congress has frequently — at least 16 times since 1916 — specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as "time of war or when war is imminent," the needs of "public safety" or of "national security or defense," or "urgent and impending need." The period of governmental operation has been limited, as, for instance, to "sixty days after the restoration of productive efficiency." Congress also has not left to implication that just compensation be paid: it has usually legislated in detail regarding enforcement of this litigation-breeding general requirement.

Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special congressional enactment to meet each particular need. Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by "national emergency" strikes and lockouts. The termination of wartime seizure powers on December 31, 1946, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the "health or safety" of the nation was endangered, was thoroughly canvassed by Congress and rejected. No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress. Authorization for seizure as an available remedy for potential dangers was unequivocally put aside. An amendment presented in the House providing that where necessary "to preserve and protect the public health and security" the President might seize any industry in which there is an impending curtailment of production, was voted down after debate, by a vote of more than three to one.

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[N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words.

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II. Down to the World War II period, then, the record is barren of instances comparable to the one before us.

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

Chief Justice VINSON, with whom Justice REED and Justice MINTON join, dissenting.

The President of the United States directed the Secretary of Commerce to take temporary possession of the Nation's steel mills during the existing emergency because "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors and airmen engaged in combat in the field."

In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised. Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

In 1950, when the United Nations called upon member nations "to render every assistance" to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men. Hostilities have not abated. The "determination of the United Nations to continue its action in Korea to meet the aggression" has been reaffirmed. Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization, as hereinafter described. Alert to our responsibilities, which coincide with our own self preservation through mutual security, Congress has enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program,

Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel. Accordingly, when the collective bargaining agreements between the Nation's steel producers and their employees, represented by the United Steel Workers, were due to expire on December 31, 1951, and a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production.

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case — that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. Even ignoring for the moment whatever confidential information the President may possess as "the Nation's organ for foreign affairs," the uncontroverted affidavits in this record amply support the finding that "a work stoppage would immediately jeopardize and imperil our national defense."

Plaintiffs do not remotely suggest any basis for rejecting the President's finding that any stoppage of steel production would immediately place the Nation in peril. At the time of seizure there was not, and there is not now, the slightest evidence to justify the belief that any strike will be of short duration. The Union and the steel companies may well engage in a lengthy struggle. Plaintiff's counsel tells us that "sooner or later" the mills will operate again. That may satisfy the steel companies and, perhaps, the Union. But our soldiers and our allies will hardly be cheered with the assurance that the ammunition upon which their lives depend will be forthcoming — "sooner or later," or, in other words, "too little and too late."

Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed" — a duty described by President Benjamin Harrison as "the central idea of the office." The President reported to Congress the morning after the seizure that he acted because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. And, while a shutdown could

be averted by granting the price concessions requested by plaintiffs, granting such concessions would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.

Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.

Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction — either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution.

THE SCOPE OF INHERENT POWER: THE ISSUE OF EXECUTIVE PRIVILEGE

The issue of when the president may exercise inherent power arises in many contexts and is discussed throughout this chapter.

One of the most important issues concerning the inherent power of the president is whether and under what circumstances the president can invoke executive privilege. Executive privilege refers to the ability of the president to keep secret conversations with or memoranda to or from advisors. The Constitution does not mention such authority, but presidents have claimed it throughout American history. Presidents have contended that executive privilege is necessary for them to receive candid advice. Also, executive privilege is defended as important to protect national security; diplomacy is regarded as requiring secrecy.

The Supreme Court did not expressly consider the constitutionality and scope of executive privilege until 1974 in the landmark case of United States v. Nixon. Some factual background will help in understanding the case that follows. On June 17, 1972, a burglary occurred at the Democratic National Headquarters in the Watergate building in Washington, D.C. Over the course of the next year, it was discovered that the burglars were connected to the Committee for the Reelection of the President and that high-level

White House officials were involved in a cover-up. The year was filled with reporters finding evidence linking the burglary and cover-up to high officials, the president and his aides angrily denying the evidence and attacking the media, and then reporters finding further evidence and making additional allegations against the White House.

In the summer of 1973, Senator Sam Ervin from North Carolina chaired closely watched hearings of the Senate Select Committee on Watergate. One of the dramatic moments occurred when a presidential aide, Alexander Butterfield, revealed that there was a secret taping system in the Oval Office and that presidential conversations were routinely recorded.

Because top Justice Department officials, including former Attorney General John Mitchell, were suspected of involvement in the cover-up, there was political pressure for an independent investigation. Attorney General Elliot Richardson appointed Harvard law professor Archibald Cox to serve as a special prosecutor.

Cox subpoenaed tapes of White House conversations, and the president challenged the subpoena in courts. On October 12, 1973, the U.S. Court of Appeals for the District of Columbia sided with the special prosecutor and gave the president one week to file an appeal. On October 19, the president announced that he would turn over edited transcripts of the tapes and that he would ask Senator John Stennis (who was reported to be quite hard of hearing) to listen to the tapes and verify their accuracy. President Nixon also announced that he would comply with no additional subpoenas and turn over no additional tapes.

On Saturday, October 20, Special Prosecutor Archibald Cox declared Nixon's position unacceptable; there was a court order to turn over tapes, not transcripts. More important, he would seek whatever tapes he needed. President Nixon ordered Attorney General Richardson to fire Cox; Richardson refused and resigned. Nixon then asked the Justice Department's number-two official to fire Cox; William Ruckelshaus also refused and resigned. The request was then made to the number-three person in the Justice Department, Solicitor General Robert Bork. Bork then fired Cox in what came to be known as the Saturday Night Massacre.

The first resolutions calling for Richard Nixon's impeachment were introduced into the House of Representatives and intense political pressure caused the appointment of a new special prosecutor, Leon Jaworski. On March 1, 1974, a grand jury for the U.S. District Court for the District of Columbia indicted seven top officials of the Nixon administration and the Committee for the Reelection of the President for obstruction of justice and conspiracy to defraud. President Nixon was named an "unindicted co-conspirator." The grand jury said that it would have indicted him for being part of the conspiracy, but did not know if it had the authority to indict a sitting president.

On April 18, 1974, a subpoena duces tecum (a subpoena to produce documents) was issued, at the request of the special prosecutor, for the president to turn over tapes and other materials to use as possible evidence in the upcoming criminal trial. On April 30, President Nixon announced that he was disclosing edited transcripts of 43 conversations, including 20 that were the subject of the subpoena. On May 1, the president moved to quash the subpoena. On May 20, the U.S. District Court denied the

motion to quash and directed the president to provide all of the items that had been subpoenaed. The Supreme Court granted review prior to consideration by the Court of Appeals.

Meanwhile, the House Judiciary Committee was considering articles of impeachment against President Nixon. Impeachment hearings were held in July 1974, while the *Nixon* case was pending before the Supreme Court. The Supreme Court announced its decision in *Nixon* on July 25, 1974, and unanimously ruled that Nixon had to comply with the subpoena. The House Judiciary Committee voted its first article of impeachment on July 25 for obstruction of justice in connection with the Watergate break-in and cover-up. On July 29 and 30, the Committee voted two additional articles of impeachment for abuse of power and for failure to comply with a judiciary committee subpoena.

On August 6, 1974, President Nixon complied with the subpoena and made the transcripts of the tapes available to the public. The tapes showed that President Nixon clearly had obstructed justice by ordering the Federal Bureau of Investigation not to investigate the Watergate matter. Three days later, on Thursday, August 9, 1974, President Nixon became the only president in history to resign.

UNITED STATES v. RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

418 U.S. 683 (1974)

Chief Justice BURGER delivered the opinion of the Court.

The Claim of Privilege

A

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

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell v. McCormack. Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal

courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison.

B

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

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

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

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

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

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.

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

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

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

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications

will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

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

For the first time since United States v. Nixon, in Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367 (2004), the Supreme Court considered an issue of executive privilege. The case arose in an unusual procedural context. A lawsuit was filed claiming that an energy task force, chaired by Vice President Dick Cheney, violated the Federal Advisory Committee Act by holding secret meetings. The plaintiffs sought and received a discovery order. The defendants then sought a writ of mandamus from the Court of Appeals to stop enforcement of the discovery order. The Court of Appeals denied the writ of mandamus. In the context of considering whether the Court of Appeals should have issued a writ of mandamus, the Supreme Court discussed executive privilege and when it is to be considered. The Court did not resolve whether executive privilege applied here, or even whether mandamus should be issued. The Court remanded the case for further consideration. In discussing executive privilege, the Court, in an opinion by Justice Kennedy, distinguished United States v. Nixon, and stated:

> [S]eparation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. The Court of Appeals dismissed these separation-of-powers concerns. Relying on United States v. Nixon, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice President and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision."
>
> This analysis, however, overlooks fundamental differences in the two cases. *Nixon* cannot bear the weight the Court of Appeals puts upon it. First, unlike this case, which concerns respondents' requests for information for use in a civil suit, *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communications and the "constitutional need for production of relevant evidence in a criminal proceeding." The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon.* As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions."

Contrary to the District Court's and the Court of Appeals' conclusions, *Nixon* does not leave them the sole option of inviting the Executive Branch to invoke executive privilege while remaining otherwise powerless to modify a party's overly broad discovery requests. Executive privilege is an extraordinary assertion of power "not to be lightly invoked." Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These "occasion[s] for constitutional confrontation between the two branches" should be avoided whenever possible.

As we discussed at the outset, under principles of mandamus jurisdiction, the Court of Appeals may exercise its power to issue the writ only upon a finding of "exceptional circumstances amounting to a judicial 'usurpation of power,'" or "a clear abuse of discretion." As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties.

We decline petitioners' invitation to direct the Court of Appeals to issue the writ against the District Court. [M]atters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the de facto membership doctrine.

THE AUTHORITY OF CONGRESS TO INCREASE EXECUTIVE POWER

The above discussion focused on the power of the president to act without express constitutional or statutory authority. But what about the power of Congress to enhance the powers of the president by conferring authority not contained in the Constitution? Underlying this issue are two different views of separation of powers. One approach sees separation of powers as appropriately resolved, whenever possible, between the president and Congress; if the two branches agree, the courts only rarely should invalidate their actions. The other view sees separation of powers as limits mandated by the Constitution and therefore envisions a crucial judicial role in enforcing its requirements.

The issue of Congress's authority to increase executive power arises again, importantly, in the next section, which focuses on the ability of Congress to delegate legislative power to administrative agencies. In Clinton v. City of New York, 524 U.S. 417 (1998), the Supreme Court considered the constitutionality of a federal statute that created

authority for a presidential line-item veto. The statute empowered the president to veto (or more precisely to "cancel") particular parts of appropriation bills while allowing the rest to go into effect.[4] Congress could overturn such a veto by a majority vote of both houses.

The Supreme Court, in an opinion by Justice Stevens, declared this statutory increase in presidential power unconstitutional. Justice Stevens explained that the president, by exercising the line-item veto, was changing a law adopted by Congress; the final version of the law is different after the veto than what Congress passed. The Court concluded that the Constitution does not allow such presidential authority. Justice Stevens wrote: "In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. '[R]epeal of statutes, no less than enactment, must conform with Art. I.' There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." The Court emphasized that the procedures for enacting and vetoing laws contained in the Constitution must be strictly adhered to and that any changes must come from a constitutional amendment, not legislative action.

Justice Breyer, joined by Justices O'Connor and Scalia, dissented, and stressed the practical need for a line-item veto. He explained that when the Constitution was written, the national budget was $4 million and each appropriation could be in a separate bill. Today, though, with a federal budget of $1.5 trillion, "a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately."

Justice Breyer disagreed with the majority's conclusion that the president was amending the law by exercising the line-item veto. Justice Breyer explained: "When the President 'canceled' the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact."

In large part, the difference between the majority in Clinton v. City of New York is the difference between a formalist and a functional approach to separation of powers that reappears throughout the material in this chapter. Justice Stevens's majority opinion was highly formalistic in stressing the procedures prescribed in the Constitution for enacting laws and eschewing any consideration of the practical benefits of a line-item veto. In contrast, Justice Breyer's dissenting opinion emphasized the need for a line-item veto in light of the myriad ways in which the budget process has changed with the growth of government over 200 years.

B. THE CONSTITUTIONAL PROBLEMS OF THE ADMINISTRATIVE STATE

One of the most dramatic changes in American government since the Constitution was written in 1787 has been the growth of administrative agencies. Although federal agencies and departments have existed in some form since the beginning of American history, it is only in the last century that Congress has routinely delegated its legislative power to executive agencies. The creation of the Interstate Commerce Commission in

1887 ushered in a new era for the federal government: the creation of federal administrative agencies with broad powers. Over the course of the next century, a vast array of federal agencies were created, such as the Federal Communications Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, the Nuclear Regulatory Commission, and countless more.

These agencies exercise all of the powers of government: legislative, executive, and judicial. Administrative agencies generally have legislative power, as they possess the authority to promulgate rules that have the force of law. Administrative agencies also have executive power, because they are responsible for bringing enforcement actions against those who violate the relevant federal laws and regulations. Finally, administrative agencies frequently have judicial power in that they employ administrative law judges who hear cases brought by agency officials against those accused of violating the agency's regulations.

The combination of legislative, executive, and judicial power in the same hands is troubling. James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (Clinton Rossiter ed., 1961). More generally, controlling and checking administrative agencies poses an important constitutional problem, unaddressed by the text or the framers' intent.

Subsection 1 considers the nondelegation doctrine, the principle that Congress cannot delegate legislative power, and its demise. The existence of broad delegations of legislative authority to administrative agencies is part of the constitutional problem posed by administrative agencies. One possible check on administrative agencies is the "legislative veto": Congress, acting pursuant to statutory authorization, invalidates an agency's action by a resolution that is not presented to the President for a possible veto. However, as presented in Subsection 2, the Supreme Court declared this tool unconstitutional. Subsection 3 then examines other checks on administrative agencies, including the appointment and removal power, judicial review, and Congress delegating authority to itself.

The tension explored throughout this section is on how to reconcile the practical need for administrative agencies in the complex, modern world with basic principles of separation of powers and checks and balances.

1. The Nondelegation Doctrine and Its Demise

One solution to the constitutional problems posed by administrative agencies is the non-delegation doctrine: the principle that Congress may not delegate its legislative power to administrative agencies. The nondelegation doctrine forces a politically accountable Congress to make the policy choices, rather than leaving this to unelected administrative officials.

The height of the Court's enforcement of the nondelegation doctrine was in the mid-1930s in two decisions that invalidated New Deal legislation. The National Industrial

Recovery Act, a key piece of New Deal legislation, authorized the president to approve "codes of fair competition" developed by boards of various industries.

A.L.A. SCHECHTER POULTRY CORP. v. UNITED STATES

295 U.S. 495 (1935)

[The A.L.A. Schechter Poultry Corporation was indicted for an alleged conspiracy and for violations of the Code of Fair Competition for the Live Poultry Industry of the metropolitan area in and about the city of New York. The Code of Fair Competition prescribed labor standards for poultry businesses and many aspects of how such businesses could operate. The code was created by a business group delegated this authority by a federal law, the National Industrial Recovery Act.]

Chief Justice HUGHES delivered the opinion of the Court.[5]

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make — that the code "will tend to effectuate the policy of this title."

Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

PANAMA REFINING CO. v. RYAN

293 U.S. 388 (1935)

[A provision of the National Industrial Recovery Act authorized the president to prohibit transportation in interstate and foreign commerce of petroleum produced in excess of the amount permitted by state.]

Chief Justice HUGHES delivered the opinion of the Court.

On July 11, 1933, the President, by Executive Order No. 6199 prohibited "the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State." This action was based on section 9(c) of title 1 of the National Industrial Recovery Act of June 16, 1933.

[The federal law] contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be -prohibited — nothing as to the policy of prohibiting or not prohibiting the transportation of production exceeding what the states allow.

It is no answer to insist that deleterious consequences follow the transportation of "hot oil" — oil exceeding state allowances. The Congress did not prohibit that transportation. The Congress did not undertake to say that transportation of "hot oil" was injurious. The Congress did not say that transportation of that oil was "unfair competition." The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased.

The Constitution provides that "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." And the Congress is empowered "To make all Laws which shall be necessary and proper for carrying into Execution" its general powers. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a

legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its lawmaking function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.

In the more than 90 years since *Panama Oil* and *Schechter*, not a single federal law has been declared an impermissible delegation of legislative power by the Supreme Court. Although these decisions have not been expressly overruled, they never have been followed either. All delegations, no matter how broad, have been upheld. Although the Court says that when Congress delegates its legislative power it must provide criteria to guide the agency's exercise of discretion,[6] all delegations, even without any criteria, have been upheld. Undoubtedly, this reflects a judicial judgment that broad delegations were necessary in the complex world of the late twentieth century and that the judiciary is ill equipped to draw meaningful lines. For example, in Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court upheld the Federal Sentencing Reform Act, which created the United States Sentencing Commission, an agency located in the judicial branch with broad discretion to promulgate sentencing guidelines to determine the punishments for those convicted of federal crimes.

Many have predicted a revival of the nondelegation doctrine, but it has not happened, as illustrated by the Supreme Court's recent decision in Gundy v. United States. In *Gundy*, the Court again rejected a challenge to a federal law on this basis. But notice that the decision was 5-3 (Justice Kavanaugh had not been confirmed when the case was argued) and it is without a majority opinion. Although Justice Kagan's plurality opinion would give little effect to the non-delegation doctrine, Justice Alito's brief concurring opinion expresses a willingness to reconsider the law in this area. In light of the dissent and the confirmation of Justice Kavanaugh, there might be a majority willing to do so.

GUNDY v. UNITED STATES

139 S. Ct. 2116 (2019)

Justice KAGAN announced the judgment of the Court and delivered an opinion, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. §20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under §20913(d), the Attorney

General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. In 1994, Congress first conditioned certain federal funds on States' adoption of registration laws meeting prescribed minimum standards. Two years later, Congress strengthened those standards, most notably by insisting that States inform local communities of registrants' addresses. By that time, every State and the District of Columbia had enacted a sex-offender registration law. But the state statutes varied along many dimensions, and Congress came to realize that their "loopholes and deficiencies" had allowed over 100,000 sex offenders (about 20% of the total) to escape registration. In 2006, to address those failings, Congress enacted SORNA.

SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years.

Section 20913 — the disputed provision here — elaborates the "[i]nitial registration" requirements for sex offenders. Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment — a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were "lost" to the system). And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."

Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of §2250. He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue. Today, we join the consensus and affirm.

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." But the Constitution does not "deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." Congress may "obtain[ ] the assistance of its coordinate Branches" — and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because §20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders — to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." If that were so, we would face a nondelegation question. But it is not. This Court has already interpreted §20913(d) to say something different — to require the Attorney General to apply SORNA to all pre-Act

offenders as soon as feasible. And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds.

Recall again the delegation provision at issue. Congress gave the Attorney General authority to "specify the applicability" of SORNA's requirements to pre-Act offenders. §20913(d). And in the second half of the same sentence, Congress gave him authority to "prescribe rules for the registration of any such sex offenders . . . who are unable to comply with" subsection (b)'s initial registration requirement. What does the delegation in §20913(d) allow the Attorney General to do?

The different answers on offer here reflect competing views of statutory interpretation. As noted above, Gundy urges us to read §20913(d) to empower the Attorney General to do whatever he wants as to pre-Act offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between). Gundy bases that argument on the first half of §20913(d), isolated from everything else — from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. Reynolds [v. United States (2012)] took a different approach (as does the Government here), understanding statutory interpretation as a "holistic endeavor" which determines meaning by looking not to isolated words, but to text in context, along with purpose and history.

This Court has long refused to construe words "in a vacuum," as Gundy attempts. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." And beyond context and structure, the Court often looks to "history [and] purpose" to divine the meaning of language. That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions. To define the scope of delegated authority, we have looked to the text in "context" and in light of the statutory "purpose." In keeping with that method, we again do so today.

So begin at the beginning, with the "[d]eclaration of purpose" that is SORNA's first sentence. There, Congress announced that "to protect the public," it was "establish[ing] a comprehensive national system for the registration" of "sex offenders and offenders against children." The term "comprehensive" has a clear meaning — something that is all-encompassing or sweeping. That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. After all, for many years after SORNA's enactment, the great majority of sex offenders in the country would be pre-Act offenders. If Gundy were right, all of those offenders could be exempt from SORNA's registration requirements. So the mismatch between SORNA's statement of purpose and Gundy's view of §20913(d) is as stark as stark comes.

The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. Recall that Congress designed SORNA to address "loopholes and deficiencies" in existing registration laws.

Now that we have determined what §20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." Those standards, the Court has made clear, are not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" Only twice in this country's history (and that in a single year) have we found a delegation excessive — in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion. See A. L. A. Schechter Poultry Corp. v. United States (1935); Panama Refining Co. v. Ryan (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health."

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative — and, more specifically, transitional — in nature.

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional — dependent as Congress is on the need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." Among the judgments often left to executive officials are ones involving feasibility.

It is wisdom and humility alike that this Court has always upheld such "necessities of government."

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

Justice ALITO, concurring in the judgment.

The Constitution confers on Congress certain "legislative [p]owers," Art. I, §1, and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But

because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

Justice GORSUCH, with whom The Chief Justice and Justice THOMAS join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice Alito supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses *after* Congress adopted the Sex Offender Registration and Notification Act (SORNA) in 2006, the statute offers detailed instructions.

But what about those convicted of sex offenses *before* the Act's adoption? At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states." Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes. So Congress simply passed the problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U.S.C. §20913(d):

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."

Yes, that's it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration

requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register." For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases. And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations." Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country — a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

Unsurprisingly, different Attorneys General have exercised their discretion in different ways. For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders. A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders. Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment. Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted.

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term — 10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently.

II

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative."

Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty. An "excess of law-making" was, in their words, one of "the diseases to which our governments are most liable." To address that tendency, the framers went to great lengths to make lawmaking difficult. Nor was the point only to limit the government's capacity to restrict the people's freedoms. Article I's detailed processes for new laws were also designed to promote deliberation.

Other purposes animated the framers' design as well. Because men are not angels and majorities can threaten minority rights, the framers insisted on a legislature composed of

different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people's representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation.

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense." Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to "'disguise . . . responsibility for . . . the decisions.'"

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test?

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court responded by striking down statutes for violating the separation of powers. (A. L. A. Schechter Poultry Corp. v. United States; Panama Refining Co. v. Ryan.)

After *Schechter Poultry* and *Panama Refining*, Congress responded by writing a second wave of New Deal legislation more "[c]arefully crafted" to avoid the kind of problems that sank these early statutes. And since that time the Court hasn't held another statute to violate the separation of powers in the same way. Of course, no one thinks that the Court's quiescence can be attributed to an unwavering new tradition of more scrupulously drawn statutes. Some lament that the real cause may have to do with a mistaken "case of death by association" because *Schechter Poultry* and *Panama Refining* happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions. But maybe the most likely explanation of all lies in the story of the evolving "intelligible principle" doctrine.

This Court first used that phrase in 1928 in J. W. Hampton, Jr., & Co. v. United States, where it remarked that a statute "lay[ing] down by legislative act an intelligible principle

to which the [executive official] is directed to conform" satisfies the separation of powers.

Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. This mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.

To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties.

III

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details." This much appears to have been deliberate, too. Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case — the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties — could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing — to "'unit[e]'" the "'legislative and executive powers . . . in the same person'" — would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.

Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also

commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

The only real surprise is that the Court fails to make good on the consequences the government invited, resolving nothing and deferring everything. In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."

2. The Legislative Veto and Its Demise

In light of the demise of the nondelegation doctrine, the issue arises as to how the power of administrative agencies will be checked and controlled. Congress, of course, could enact a law overturning an agency's rule, but requiring legislative action obviously limits the circumstances in which Congress can or will exercise its checking function.

Therefore, in the 1930s, not coincidentally corresponding to the time of great growth in federal administrative agencies, Congress created the "legislative veto" as a check on the actions of administrative agencies. Congress included in statutes provisions authorizing Congress or one of its houses or committees to overturn an agency's action by doing something less than adopting a new law. A typical form of a legislative veto provision authorized Congress to overturn an agency's decision by a resolution of one house of Congress. Legislative vetoes also took the form of overturning agency rules by resolution of both houses of Congress or even by action of a congressional committee. Nearly 200 federal laws contained legislative veto provisions.[7]

In Immigration and Naturalization Service (INS) v. Chadha, the Supreme Court declared unconstitutional the legislative veto.

IMMIGRATION & NATURALIZATION SERVICE v. JAGDISH RAI CHADHA

p. 305

462 U.S. 919 (1983)

Chief Justice BURGER delivered the opinion of the Court.

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

I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." Pursuant to §242(b) of the Immigration and Nationality Act (Act), a deportation hearing was held before an immigration judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under §244(a)(1) of the Act.

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

Pursuant to §244(c)(1) of the Act, the immigration judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress [by resolution of either the Senate or the House of Representatives], Congress had the power under §244(c)(2) of the Act to veto the Attorney General's determination that Chadha should not be deported.

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens," including Chadha. The resolution was referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." The resolution was passed without debate or recorded vote. Since the House action was pursuant to §244(c)(2), the resolution was not treated as an Article I legislative act; it was not submitted to the Senate or presented to the President for his action.

II

A

We turn now to the question whether action of one House of Congress under §244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. By the same token, the fact that a given law or procedure is

efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies: "Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws."

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

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; . . ." "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."

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers and we now turn to Art. I.

b. THE PRESENTMENT CLAUSES

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. The President's role in the lawmaking process also reflects the framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.

c. BICAMERALISM

The bicameral requirement of Art. I, §1, 7 was of scarcely less concern to the framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.

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

[III]

[W]e must establish that the challenged action under §244(c)(2) is of the kind to which the procedural requirements of Art. I, §7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

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

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

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

> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, §2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, §3, cl. 5;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, §2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, §2, cl. 2.

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

Since it is clear that the action by the House under §244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress's power to override a veto were intended to erect

enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Justice POWELL, concurring in the judgment.

The Court's decision, based on the Presentment Clauses, Art. I, §7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930s. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. One reasonably may disagree with Congress' assessment of the veto's utility, but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide this case. In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

Functionally, the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. *See* Nixon v. Administrator of General Services (1977); United States v. Nixon (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *See* Youngstown Sheet & Tube Co. v. Sawyer. This case presents the latter situation.

On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a de novo determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts. Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative function of Congress," the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch.

The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the framers sought to avoid — the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress's power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

Justice WHITE, dissenting.

Today the Court not only invalidates §244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

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

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

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches — the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

For all these reasons, the apparent sweep of the Court's decision today is regrettable. The Court's Article I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decision in a case involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class is irresponsible.

The reality of the situation is that the constitutional question posed today is one of immense difficulty over which the executive and legislative branches — as well as scholars and judges — have understandably disagreed. That disagreement stems from the silence of the Constitution on the precise question: The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of Separation of Powers which are reflected in that Article and throughout the Constitution. We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the government of the United States has become an endeavor far beyond the contemplation of the framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation's lawmakers. But the wisdom of the framers was to anticipate that the nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles.

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

The central concern of the presentation and bicameralism requirements of Article I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress — or, in the event of a presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by

the operation of §244(c)(2). The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period. Thus, a change in the legal status quo — the deportability of the alien — is consummated only with the approval of each of the three relevant actors. The disagreement of any one of the three maintains the alien's pre-existing status: the Executive may choose not to recommend suspension; the House and Senate may each veto the recommendation. The effect on the rights and obligations of the affected individuals and upon the legislative system is precisely the same as if a private bill were introduced but failed to receive the necessary approval.

Thus understood, §244(c)(2) fully effectuates the purposes of the bicameralism and presentation requirements. I regret that I am in disagreement with my colleagues on the fundamental questions that this case presents. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult "to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people," Arizona v. California (1963) (Harlan, J., dissenting). I must dissent.

Chadha involved a legislative veto of an adjudicatory proceeding; Congress, by resolution of the House of Representatives, overturned an immigration judge's decision to allow Chadha to remain in the country. Almost immediately after *Chadha*, the Court extended its holding to preclude legislative vetoes of agency rules. *See*, *e.g.*, Process Gas Consumers Group v. Consumers Energy Council of America, 463 U.S. 1216 (1983). It is thus clearly established that if Congress wants to overturn an executive action there must be bicameralism, passage by both houses of Congress, and presentment, giving the bill to the President for signature or veto. Anything less is a legislative veto and legislative vetoes are unconstitutional.

3. Checking Administrative Power

What other mechanisms exist to check administrative agencies and are they sufficient? Congress can control administrative agencies through statutes. For instance, laws can be enacted directing agencies to perform certain tasks or denying them authority in particular areas. Also, Congress can overturn agency decisions by statute, following the prescribed procedures for bicameralism and presentment. The president, of course, can veto such statutes, requiring that Congress act by a two-thirds vote to effectuate such a check.

Furthermore, Congress controls the budget of administrative agencies and can use this to exercise an important check on their work. Congressional committees that oversee particular agencies often play a key role in monitoring and controlling agency actions.

Another important check on agencies is the appointment and removal power. The president's authority to select members of agencies, subject to confirmation by the

Senate, often directs the conduct of the agencies. Also, the president's power to remove agency officials is another check. The appointment and removal power have generated many constitutional issues concerning separation of powers and are worth examining.

THE APPOINTMENT POWER

Article II, §2 provides that the president "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, to the Courts of Law, or in the Heads of Departments."

The key constitutional issue here concerns who may possess the appointment power. Morrison v. Olson is the leading case dealing with this issue.

ALEXIA MORRISON, INDEPENDENT COUNSEL v. THEODORE B. OLSON

487 U.S. 654 (1988)

Chief Justice REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel."

If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel." Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction."

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." Under §594(a)(9), the counsel's powers include "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States."

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides: "An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

The other provision governing the tenure of the independent counsel defines the procedures for "terminating" the counsel's office. Under §596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."

Finally, the Act provides for congressional oversight of the activities of independent counsel. An independent counsel may from time to time send Congress statements or reports on his or her activities.

[II]

The Appointments Clause of Article II reads as follows:

> [The President] 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.

U.S. Const., Art. II, §2, cl. 2.

The parties do not dispute that "[t]he Constitution for purposes of appointment . . . divides all its officers into two classes." As we stated in Buckley v. Valeo (1976): "[P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by

the heads of departments, or by the Judiciary." The initial question is, accordingly, whether appellant is an "inferior" or a "principal" officer. If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between "inferior" and "principal" officers is one that is far from clear, and the framers provided little guidance into where it should be drawn. We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department.

Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

Justice SCALIA, dissenting.

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish — so that "a gradual concentration of the several powers in the same department," Federalist No. 51 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

To repeat, Article II, §1, cl. 1, of the Constitution provides: "The executive Power shall be vested in a President of the United States."

This does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive,'" though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere — if conducted by government at all — been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General." Governmental investigation and prosecution of crimes is a quintessentially executive function.

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control. "Most importan[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" This is somewhat like referring to shackles as an effective means of locomotion.

The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches. Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "so central to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "sufficient control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress. Or to bring the point closer to home, consider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts — perhaps "clear error" review,

which would be a fair judicial equivalent of the Attorney General's "for cause" removal power here. Is there any doubt that we would not pause to inquire whether the matter was "so central to the functioning of the Judicial Branch" as really to require complete control, or whether we retained "sufficient control over the matters to be decided that we are able to perform our constitutionally assigned duties"? We would say that our "constitutionally assigned duties" include complete control over all exercises of the judicial power. We should say here that the President's constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since all purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

The authority for creating an Independent Counsel, the Ethics in Government Act, expired in 1999. After the investigation of President Bill Clinton by Independent Counsel Kenneth Starr, described more fully in the last section of this chapter, Congress simply let the Act expire and did not renew the authority for the creation of an Independent Counsel. Some believe that this is a vindication for the views expressed by Justice Scalia in his dissent in Morrison v. Olson, while others contend that the expiration of the authority for an Independent Counsel is a serious mistake that will be regretted when there are future scandals involving the President or high-level executive officials.

The Court has imposed one important limit on who may possess the appointment power: The Court has held that Congress cannot give the appointment power to itself or to its officers. Article II specifies several possibilities as to who may possess the appointment power; Congress is not among them. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court held unconstitutional a federal law that empowered the Speaker of the House of Representatives and the President Pro Tempore of the Senate to appoint four of the six members of the Federal Election Commission.

The Court emphasized the text of Article II, which specifies who may possess the appointment power. The Court said that under Article II, Congress could vest the appointment power for inferior offices in the President, the heads of departments, or the lower federal courts. The Speaker of the House and the President Pro Tem of the Senate are obviously none of these and therefore the Court found that they could not possess the appointment power.

The most recent case concerning the definition of "officers" was Lucia v. Securities and Exchange Commission, 138 S. Ct. 2044 (2018). In *Lucia*, the Court considered whether administrative law judges should be regarded as "Officers of the United States" — as distinct from mere employees of the federal government — who must be appointed by the President, courts of law, or heads of departments.

The Securities and Exchange Commission instituted a proceeding against Raymond Lucia for deceiving prospective clients about a retirement savings strategy called "Buckets of Money." The case was adjudicated by an administrative law judge (ALJ), who found Lucia guilty and imposed sanctions, including $300,000 in civil penalties and a lifetime bar from the investment industry.

In his appeal, Lucia argued that the administrative appeal was invalid because the ALJ had not been constitutionally appointed. Lucia argued that ALJs are officers of the United States and subject to the appointments clause, and that the ALJ had not been appointed by the president, a court of law, or a head of department.

Justice Kagan, writing for the majority, said that under Freytag v. Commissioner, 501 U.S. 868 (1991), ALJs should be considered officers of the United States. In *Freytag*, the Court held that the special tax judges of the United States Tax Court are officers of the United States. The Court noted that they held a "continuing office" and exercised "significant discretion."

The Court in *Lucia* concluded that administrative law judges likewise hold continuing offices and exercise significant discretion. Justice Kagan, writing for the Court, explained: "*Freytag* says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. . . . Far from serving temporarily or episodically, SEC ALJs 'receive[ ] a career appointment.' Still more, the Commission's ALJs exercise the same 'significant discretion' when carrying out the same 'important functions' as STJs do."

The Court thus ruled that Lucia should get a new hearing before a properly appointed officer of the United States. This, of course, affects administrative law judges throughout the federal government. The SEC only has five ALJs, but the Social Security Administration has 1,500. It is hard to see how they would be any different from the ALJs at the SEC. That means Congress will have to decide whether to have them appointed by the President, the federal courts, or, most likely, the heads of departments.

But the Court also leaves open the definition of inferior officers, and this will invite litigation outside the ALJ context. What authority is enough to make someone an officer of the United States? Also, once they are deemed "officers" this raises issues

concerning the constitutionality of limits on removal. The Court did not address this issue, though it was briefed in the case and raised by Justice Breyer.

The Court also recently dealt with another issue concerning the appointments power: When may the president make recess appointments?

NLRB v. NOEL CANNING

573 U.S. 513 (2014)

Justice BREYER delivered the opinion of the Court.

Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." But the Recess Appointments Clause creates an exception. It gives the President alone the 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." Art. II, §2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (*i.e.,* a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "*pro forma* session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012. In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The

Board ordered the distributor to execute the agreement and to make employees whole for any losses.

The Pepsi-Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act.

The three members in question were Sharon Block, Richard Griffin, and Terence Flynn. In 2011 the President had nominated each of them to the Board. As of January 2012, Flynn's nomination had been pending in the Senate awaiting confirmation for approximately a year. The nominations of each of the other two had been pending for a few weeks. On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. [T]he Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for "the assistance of subordinates," and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year.

Second, *in interpreting the Clause, we put significant weight upon historical practice*. There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase "*the recess* of the Senate." The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an "intersession recess." The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will "adjourn *sine die*," *i.e.,* without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such "intra-session recess" by adopting a resolution stating that it will "adjourn" to a fixed date, a few days or weeks or even months later. All agree that the phrase "the recess of the Senate" covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.”

We recognize that the word “the” in “*the* recess” might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word “the” frequently (but not always) indicates “a particular thing.” But the word can also refer “to a term used generically or universally.” Reading “the” generically in this way, there is no linguistic problem applying the Clause’s phrase to both kinds of recess. And, in fact, the phrase “the recess” was used to refer to intra-session recesses at the time of the founding.

The constitutional text is thus ambiguous. And we believe the Clause’s purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to “great weight in a proper interpretation” of the constitutional provision.

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a “recess”? The Clause itself does not say. And Justice Scalia claims that this silence itself shows that the Framers intended the Clause to apply only to an inter-session recess.

We disagree. For one thing, the most likely reason the Framers did not place a textual floor underneath the word “recess” is that they did not foresee the *need* for one. They might have expected that the Senate would meet for a single session lasting at most half

a year. Moreover, the lack of a textual floor raises a problem that plagues *both* interpretations — Justice Scalia's and ours. Today a brief inter-session recess is just as possible as a brief intra-session recess.

We agree with the Solicitor General that a 3-day recess would be too short. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power.

That is not to say that the President may make recess appointments during any recess that is "more than three days." The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days.

In sum, we conclude that the phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well.

IV

The second question concerns the scope of the phrase "vacancies *that may happen* during the recess of the Senate." All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause's language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of "happens" as applied to a "vacancy" (at least to a modern ear) is that the vacancy "happens" when it initially occurs. But that is not the only possible way to use the word.

In any event, the linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. And the broader reading, we believe, is at least a permissible reading of a "'doubtful'" phrase. We consequently go on to consider the Clause's purpose and historical practice.

The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.

At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to "fill up all vacancies" that occur before, and continue to exist during, the Senate's recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might

thereby routinely avoid the constitutional need to obtain the Senate's "advice and consent."

While we concede that both interpretations carry with them some risk of undesirable consequences, we believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. The tradition is long enough to entitle the practice "to great regard in determining the true construction" of the constitutional provision. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase "all vacancies" includes vacancies that come into existence while the Senate is in session.

V

The third question concerns the calculation of the length of the Senate's "recess." On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene "*pro forma* session[s]" only, with "no business . . . transacted," on every Tuesday and Friday from December 20, 2011, through January 20, 2012. At the end of each *pro forma* session, the Senate would "adjourn until" the following *pro forma* session. During that period, the Senate convened and adjourned as agreed. It held *pro forma* sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each *pro forma* session, it adjourned until the time and date of the next.

The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 *pro forma* sessions. We must determine the significance of these sessions — that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President's recess-appointment power. If the latter, however, then the 3-day period was part of a much longer recess during which the President did have the power to make recess appointments.

The Solicitor General argues that we must treat the *pro forma* sessions as periods of recess. He says that these "sessions" were sessions in name only because the Senate

was in recess as a *functional* matter. The Senate, he contends, remained in a single, unbroken recess from January 3, when the second session of the 112th Congress began by operation of the Twentieth Amendment, until January 23, when the Senate reconvened to do regular business.

In our view, however, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to "determine the Rules of its Proceedings." Art. I, §5, cl. 2.

Applying this standard, we find that the *pro forma* sessions were sessions for purposes of the Clause. First, the Senate said it was in session. Second, the Senate's rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During any *pro forma* session, the Senate could have conducted business simply by passing a unanimous consent agreement. The Senate in fact conducts much of its business through unanimous consent.

VI

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess — intra-session or inter-session — of sufficient length.

Justice Scalia would render illegitimate thousands of recess appointments reaching all the way back to the founding era. More than that: Calling the Clause an "anachronism," he would basically read it out of the Constitution. He performs this act of judicial excision in the name of liberty. We fail to see how excising the Recess Appointments Clause preserves freedom.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue.

Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, concurring in the judgment.

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition.

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

I. Our Responsibility

Today's majority disregards two overarching principles that ought to guide our consideration of the questions presented here.

First, the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." p. 325

Second and relatedly, when questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch "to say what the law is." This Court does not defer to the other branches' resolution of such controversies; our role is in no way "lessened" because it might be said that "the two political branches are adjusting their own powers between themselves." Since the separation of powers exists for the protection of individual liberty, its vitality "does not depend" on "whether 'the encroached-upon branch approves the encroachment.'" Rather, policing the "enduring structure" of constitutional government when the political branches fail to do so is "one of the most vital functions of this Court."

II. Intra-Session Breaks

The first question presented is whether "the Recess of the Senate," during which the President's recess-appointment power is active, is (a) the period between two of the Senate's formal sessions, or (b) any break in the Senate's proceedings. I would hold that "the Recess" is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made *during* the Senate's session. The Court's contrary conclusion — that "the Recess" includes "breaks in the midst of a session," — is inconsistent with the Constitution's text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role. And although the majority relies heavily on "historical practice," no practice worthy of our deference supports the majority's conclusion on this issue.

A. PLAIN MEANING

A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term "Recess" in contradistinction to the term "Session." In the founding era, the terms "recess" and "session" had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments "*sine die*," that is, without a specified return date.

To be sure, in colloquial usage both words, "recess" and "session," could take on alternative, less precise meanings. A session could include any short period when a legislature's members were "assembled for business," and a recess could refer to any brief "suspension" of legislative "business." But as even the majority acknowledges, the Constitution's use of "the word 'the' in '*the* [R]ecess'" tends to suggest "that the phrase refers to the single break separating formal sessions."

Besides being linguistically unsound, the majority's reading yields the strange result that an appointment made during a short break near the beginning of one official session will not terminate until the end of the *following* official session, enabling the appointment to last for up to two years.

To avoid the absurd results that follow from its colloquial reading of "the Recess," the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase's colloquial meaning—are simply "too short to trigger the Recess Appointments Clause." But it identifies no textual basis whatsoever for limiting the length of "the Recess," nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate.

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And what about breaks longer than three days? The majority says that a break of four to nine days is "presumptively too short" but that the presumption may be rebutted in an "unusual circumstance," such as a "national catastrophe . . . that renders the Senate unavailable but calls for an urgent response."

Even if the many questions raised by the majority's failure to articulate a standard could be answered, a larger question would remain: If the Constitution's text empowers the President to make appointments during any break in the Senate's proceedings, by what right does the majority subject the President's exercise of that power to vague, court-crafted limitations with no textual basis? The majority claims its temporal guideposts are informed by executive practice, but a President's self-restraint cannot "bind his successors by diminishing their powers."

B. HISTORICAL PRACTICE

For the foregoing reasons, the Constitution's text and structure unambiguously refute the majority's freewheeling interpretation of "the Recess." It is not plausible that the Constitution uses that term in a sense that authorizes the President to make unilateral appointments during *any* break in Senate proceedings, subject only to hazy, atextual limits crafted by this Court centuries after ratification. The majority, however, insists that

history "offers strong support" for its interpretation. The historical practice of the political branches is, of course, irrelevant when the Constitution is clear. But even if the Constitution were thought ambiguous on this point, history does not support the majority's interpretation.

What does all this amount to? In short: Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends "strong support," to its interpretation of the Recess Appointments Clause. And the majority's contention that recent executive practice in this area merits deference because the Senate has not done more to oppose it is utterly divorced from our precedent. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," and the Senate could not give away those protections even if it wanted to.

III. Pre-Recess Vacancies

The second question presented is whether vacancies that "happen during the Recess of the Senate," which the President is empowered to fill with recess appointments, are (a) vacancies that *arise* during the recess, or (b) all vacancies that *exist* during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here — which undisputedly filled pre-recess vacancies — are invalid for that reason as well as for the reason that they were made during the session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority's conclusion on this issue.

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A. plain meaning

As the majority concedes, "the most natural meaning of 'happens' as applied to a 'vacancy' . . . is that the vacancy 'happens' when it initially occurs." The majority adds that this meaning is most natural "to a modern ear," but it fails to show that founding-era ears heard it differently. "Happen" meant then, as it does now, "[t]o fall out; to chance; to come to pass." Thus, a vacancy that *happened* during the Recess was most reasonably understood as one that *arose* during the recess. It was, of course, possible in certain contexts for the word "happen" to mean "happen to be" rather than "happen to occur," as in the idiom "it so happens." But that meaning is not at all natural when the subject is a vacancy, a state of affairs that comes into existence at a particular moment in time.

For another thing, the majority's reading not only strains the Clause's language but distorts its constitutional role, which was meant to be subordinate. As Hamilton explained, appointment with the advice and consent of the Senate was to be "the general mode of appointing officers of the United States."

If, however, the Clause had allowed the President to fill *all* pre-existing vacancies during the recess by granting commissions that would last throughout the following session, it

would have been impossible to regard it — as the Framers plainly did — as a mere codicil to the Constitution's principal, power-sharing scheme for filling federal offices. On the majority's reading, the President would have had no need *ever* to seek the Senate's advice and consent for his appointments: Whenever there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*. (Circumvention would have been especially easy if, as the majority also concludes, the President was authorized to make such appointments during any intra-session break of more than a few days.) It is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates.

B. HISTORICAL PRACTICE

For the reasons just given, it is clear that the Constitution authorizes the President to fill unilaterally only those vacancies that arise during a recess, not every vacancy that happens to exist during a recess. Again, however, the majority says "[h]istorical practice" requires the broader interpretation. And again the majority is mistaken. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority's interpretation.

In sum: Washington's and Adams' Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of "historical practice" — which is actually evidence of a long-simmering inter-branch conflict — would require us to defer to the views of the Executive Branch.

IV. CONCLUSION

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. The majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments. Henceforth, the Senate can avoid triggering the President's now-vast recess-appointment power by the odd contrivance of never adjourning for more than three days without holding a *pro forma* session at which it is understood that no business will be conducted. How this new regime will work in practice remains to be seen. Perhaps it will reduce the prevalence of recess appointments. But perhaps not: Members of the President's party in Congress may be able to prevent the Senate from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President may be able to adjourn both "to such Time as he shall think proper." U.S. Const., Art. II, §3. In any event, the limitation upon the President's appointment power is there not for the benefit of the Senate, but for the protection of the people; it should not be dependent on Senate action for its existence.

The real tragedy of today's decision is not simply the abolition of the Constitution's limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. Sad, but true: The Court's embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

THE REMOVAL POWER

There is no provision of the Constitution concerning the president's authority to remove executive branch officials. The principle that has emerged from the cases is that, in general, the president may remove executive officials unless removal is limited by statute. Congress, by statute, may limit removal both if it is an office where independence from the president is desirable and if the law does not prohibit removal but, rather, limits removal to instances where good cause is shown.

No single case has clearly articulated this principle. Rather it comes from the experience of Andrew Johnson's impeachment and from five Supreme Court decisions that have considered the removal power, all reviewed below. The section then concludes by describing the law concerning the removal power that emerges from this authority.

THE IMPEACHMENT OF ANDREW JOHNSON

Consideration of the removal power must begin with an incident that was never directly reviewed in the courts: the impeachment of President Andrew Johnson for firing the secretary of war in violation of a federal law that prohibited the removal.[8] After the assassination of President Abraham Lincoln, there was great consternation that a Southerner, Andrew Johnson from Tennessee, was the president at the end of the Civil War. The perception was that Johnson's sympathies were with the South and that he was obstructing reconstruction and the North's claiming the benefits of its victory. Congress passed the Tenure in Office Act of 1867 to prevent him from removing key members of the cabinet.

Secretary of War Edwin Stanton openly challenged the president's authority, and Johnson fired Stanton, even though that violated the Tenure in Office Act. The House of Representatives voted articles of impeachment based almost entirely on this removal. The vote in the Senate, however, was one short of the two-thirds necessary for removal, and thus Johnson completed his term as president.

MYERS v. UNITED STATES, 272 U.S. 52 (1926): Chief Justice TAFT delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers, appellant's intestate, was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Or., for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. He protested to the department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71.

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as section 4 of article 2, above quoted, provides for removal from office by impeachment. The subject was not discussed in the Constitutional Convention.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

It is reasonable to suppose also that had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article 1, or in the specified limitations on the executive power in Article 2. The difference between the grant of legislative power under Article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

HUMPHREY'S EXECUTOR v. UNITED STATES, 295 U.S. 602 (1935): Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. William E. Humphrey, the decedent, on December 10,

1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. The commissioner declined to resign; and on October 7, 1933, the President wrote him: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

The provisions of section 1 of the Federal Trade Commission Act, stat[e] that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein.

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. The debates in both houses demonstrate that the prevailing view was that the Commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government — not subject to the orders of the President."

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States.

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition," that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

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We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

WIENER v. UNITED STATES, 357 U.S. 349 (1958): Justice FRANKFURTER delivered the opinion of the Court.

This is a suit for back pay, based on petitioner's alleged illegal removal as a member of the War Claims Commission. The facts are not in dispute. By the War Claims Act of 1948, Congress established that Commission with "jurisdiction to receive and adjudicate according to law," claims for compensating internees, prisoners of war, and religious organizations, who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission was to be composed of three persons, at least two of whom were to be members of the bar, to be appointed by the President, by and with the advice and consent of the Senate. The Commission was to wind up its affairs not later than three years after the expiration of the time for filing

claims. This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner.

Having been duly nominated by President Truman, the petitioner was confirmed on June 2, 1950, and took office on June 8, following. On his refusal to heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower.

[T]he most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner's removal must rest. The ground of President Eisenhower's removal of petitioner was precisely the same as President Roosevelt's removal of Humphrey. Both Presidents desired to have Commissioners, one on the Federal Trade Commission, the other on the War Claims Commission, "of my own selection." They wanted these Commissioners to be their men. The terms of removal in the two cases are identical and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the control of the Executive. An analysis of the Federal Trade Commission Act left this Court in no doubt that such was not the conception of Congress in creating the Federal Trade Commission. The terms of the War Claims Act of 1948 leave no doubt that such was not the conception of Congress regarding the War Claims Commission.

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The history of this legislation emphatically underlines this fact. The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination "not subject to review by any other official of the United States or by any court by mandamus or otherwise." The claims were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," Humphrey's Executor v. United States, either the Executive or the Congress. If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body, nor even a suspensory removal until the Senate could act upon it by confirming the appointment of a new Commissioner or otherwise dealing with the matter. Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim.

BOWSHER v. SYNAR, 478 U.S 714 (1986): Chief Justice BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the "Gramm-Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs. The Act exempts certain priority programs from these cuts.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. We conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Buckley v. Valeo (1976). Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." With these principles in mind, we turn to consideration of whether the Comptroller General is controlled by Congress.

The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability. Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President pro tempore of the Senate, and confirmed by the Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment but also by joint resolution of Congress "at any time" resting on any one of the following bases: "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude."

It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

MORRISON v. OLSON, 487 U.S. 654 (1988): The case involved the constitutionality of the provisions of the Ethics in Government Act, which provide for the appointment of an independent counsel to investigate alleged wrongdoing by the president and other high-level executive officials. The portion of the opinion concerning the constitutionality of the act's having appointment of the independent counsel done by federal court judges is presented above. This is the part of the opinion concerning the removal power.

Chief Justice REHNQUIST delivered the opinion of the Court:

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. In our view, the removal provisions of the Act make this case more analogous to Humphrey's Executor v. United States (1935), and Wiener v. United States (1958), than to *Myers* or *Bowsher.*

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor* rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers*, not *Humphrey's Executor.* And, under *Myers*, the President must have absolute discretion to discharge "purely" executive officials at will.

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the

President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.

At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, 561 U.S. 477 (2010): The case involved a provision of the Sarbanes-Oxley Act of 2002. Among other measures, the act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The board is composed of five members, appointed to staggered five-year terms by the Securities and Exchange Commission. The Securities and Exchange Commission can remove members of the board only "for good cause shown," "in accordance with" certain procedures. The members of the Securities and Exchange Commission can be removed by the president only for "good cause."

Chief Justice ROBERTS delivered the opinion of the Court:

May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

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

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

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

p. 337

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

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

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to

those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

Justice BREYER wrote a dissenting opinion, joined by Justices STEVENS, GINSBURG, and SOTOMAYOR.

Congress and the President had good reason for enacting the challenged "for cause" provision. First and foremost, the Board adjudicates cases. This Court has long recognized the appropriateness of using "for cause" provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions.

Moreover, in addition to their adjudicative functions, the Accounting Board members supervise, and are themselves, technical professional experts. This Court has recognized that the "difficulties involved in the preparation of" sound auditing reports require the application of "scientific accounting principles." And this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise. Here, the justification for insulating the "technical experts" on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection.

We should ask one further question. Even if the "for cause" provision before us does not itself significantly interfere with the President's authority or aggrandize Congress' power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President's central constitutional role? The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this "for cause" provision might bring about.

The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to "the civil service." But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, the exclusion would be insufficient. Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only "for cause." I have found 48 such agencies. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only "for cause." I have identified 573 such high-ranking officials. This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES). The potential list of those whom today's decision affects is yet larger. [A]dministrative law judges (ALJs) "are all executive officers." My research reflects that the Federal

Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies

In my view the Court's decision is wrong — very wrong. Its rule of decision is both imprecise and overly broad. In light of the present imprecision, it must either narrow its rule arbitrarily, leaving it to apply virtually alone to the Accounting Board, or it will have to leave in place a broader rule of decision applicable to many other "inferior officers" as well. In doing the latter, it will undermine the President's authority. And it will create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create — in provisions this Court is sworn to uphold.

Together, these cases seem to establish that the president may fire any executive official. Congress, however, can limit removal by statute if it is an office for which independence from the president is desirable, the statute does not prohibit removal but limits it to where there is good cause, and the statute does not keep the president from firing executive branch officials where there is good cause.

Ultimately the question is whether these mechanisms for controlling administrative agencies — statutes, budget, informal committee controls, appointment, and removal — are sufficient. Some justices have suggested that it would be desirable to revive the nondelegation doctrine. Justice Scalia seemed to be arguing for this in his dissent in Morrison v. Olson, above. Additionally, in the early 1980s, Justice Rehnquist took a similar position. In Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), the Court upheld provisions of the Occupational Safety and Health Act that authorized the secretary of labor to adopt standards that are "reasonably necessary or appropriate to provide safe or healthful employment" and to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health." Justice Rehnquist, in a dissenting opinion, argued that these provisions should have been invalidated as an excessive delegation of legislative power. He wrote, "When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." If the Court were to follow the views of Rehnquist and Scalia, the issue then would become how to distinguish permissible from impermissible delegations of power.

C. SEPARATION OF POWERS AND FOREIGN POLICY

The Constitution says very little about foreign policy decision making. Article I, §8 grants Congress the power to regulate commerce with foreign nations, "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," to raise and support armies, and to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Article II says that 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." Article II also provides that the president "shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

These relatively few provisions raise many difficult and important issues. For example, what is the relationship between Congress's power to declare war and the president's authority as commander in chief? When may the president use troops, including in war situations, without a congressional declaration of war? Another illustration of the Constitution's ambiguity is whether the president can use executive agreements instead of treaties in dealing with foreign countries. Is this an appropriate exercise of the power of the chief executive or is it an unconstitutional usurpation of the Senate's power?

This is an area of constitutional law where reliance on the framers' intent is particularly difficult. A world of instantaneous communications, missiles that can be sent across the world in minutes, and troops that can be sent anywhere within hours is vastly different from that which existed in 1787.

This area of constitutional law is different in another way as well: the relative absence of judicial decisions. As described in Chapter 1, the Supreme Court frequently has declared that issues concerning foreign policy are nonjusticiable political questions — matters for the executive and legislature to resolve without judicial review. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (holding nonjusticiable a challenge to the president's rescission of the U.S. treaty with Taiwan) (included in Chapter 1).

This section considers three issues. First, are foreign policy and domestic affairs different under the Constitution? Does the president have more inherent authority regarding foreign policy than as to domestic affairs? Second, what are the constitutional limits on agreements with foreign nations? In particular, may the president use executive agreements rather than treaties? Finally, how is decision-making authority over war powers allocated?

1. Are Foreign Policy and Domestic Affairs Different?

Do the same principles of separation of powers apply in foreign policy as in domestic affairs? Should the Constitution be interpreted as according the president more inherent powers as to foreign policy? The leading case supporting this view is United States v. Curtiss-Wright Export Corp. The issue in the case is the constitutionality of a congressional delegation of power to the president in the area of foreign policy. As you read the decision, it is important to remember that the Supreme Court was aggressively enforcing the nondelegation doctrine — the principle that Congress cannot delegate legislative power to executive agencies — at the time the case was decided.

UNITED STATES v. CURTISS-WRIGHT EXPORT CORP.

299 U.S. 304 (1936)

Justice SUTHERLAND delivered the opinion of the Court.

Congress passed a resolution authorizing the President to stop sales of arms to countries involved in the Chaco border dispute. President Roosevelt immediately issued an order prohibiting munitions sales to the warring nations in the Chaco border dispute.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely, fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by section 1 of the resolution.

Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation

the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

NOTES ON CURTISS-WRIGHT

Justice Sutherland's broad interpretation of presidential power in foreign affairs has been challenged by constitutional scholars. First, some contend that his view is inconsistent with a written Constitution that contains provisions concerning foreign policy. If Sutherland's view were correct, there would have been no reason for the Constitution to enumerate any powers in the area of foreign affairs; all powers would exist automatically as part of national sovereignty. The detailing of authority for conducting foreign policy rebuts the assumption that the president has complete control over foreign affairs simply by virtue of being chief executive.[9]

Second, many have criticized the historical account that is the foundation for Justice Sutherland's opinion. Professor Charles Lofgren notes that the "history on which [*Curtiss-Wright*] rest[s] is 'shockingly inaccurate'" and not based on either the text of the Constitution or the framers' intent.[10] In his view, the framers intended that the president, like all branches of the federal government, have limited powers, not the expansive inherent authority described in *Curtiss-Wright*.

If the President has broad inherent power in foreign policy as indicated in *Curtiss-Wright*, does this mean that congressional actions to limit the president in this realm are unconstitutional? The issue arose during the 1980s in connection with an attempt by the Reagan administration to circumvent a federal law prohibiting aid to the contras in Nicaragua. The Boland Amendment to the appropriation bills barred any "agency or entity of the United States involved in intelligence activities" from spending funds "to support military or paramilitary operations in Nicaragua."[11]

Some high-level members of the Reagan administration intentionally violated the Boland Amendment by raising funds from third parties to fund the contras and by selling arms to Iran to fund the contras.[12] Some have defended these actions on the ground that the Boland Amendment was an impermissible restriction on the president's power to conduct foreign policy. For example, a Republican minority report to a House Committee report declared, "[The] Constitution gives the President some power to act on his own in foreign affairs. . . . Congress may not use its control over appropriations, including salaries, to prevent the executive or judiciary from fulfilling Constitutionally mandated obligations."[13]

Others, including the Democratic majority on the House Committee, argued that Congress controls the power of the purse and therefore should be able to control government spending. The Boland Amendment was a restriction on expenditures. Moreover, Article I gives Congress the power to regulate foreign commerce. Thus, supporters of the Boland Amendment contended that it was constitutional and the president has no authority to disobey a constitutional statute in the conduct of foreign or domestic affairs.

The Boland Amendment thus poses an example concerning the scope of the President's powers in foreign policy and the ability of Congress to impose limits. Another, more recent example of this involves the only time in history that the Supreme Court has declared unconstitutional a federal law regulating presidential conduct in the realm of foreign policy. In Zivotofsky v. Kerry, the Court considered the constitutionality of a federal law that allowed American citizens who had a child born in Jerusalem to have the child's passport say "Jerusalem, Israel" as the place of birth. The Court declared the law unconstitutional.

ZIVOTOFSKY v. KERRY

135 S. Ct. 2076 (2015)

Justice KENNEDY delivered the opinion of the Court.

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

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

Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel."

I

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of "recognition." That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that "'the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned.'"

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem."

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The subsection that lies at the heart of this case, §214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Titled "Record of Place of Birth as Israel for Passport Purposes," §214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son. She asked that his place of birth be listed as "'Jerusalem, Israel.'" The Embassy clerks explained that, pursuant to State Department policy, the passport would list only "Jerusalem." Zivotofsky's parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce §214(d).

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories:

First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Second, "in absence of either a congressional grant or denial of authority" there is a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" invite the exercise of executive power. Finally, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue.

In this case the Secretary contends that §214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." In so doing the Secretary acknowledges the President's power is "at its lowest ebb." Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone.

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

A

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

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, and may benefit from sovereign immunity when they are sued. The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. Recognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus "useful, even necessary," to the existence of a state.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, §3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending

state. It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, §2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls."

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador. The President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition — and the lack of any similar power vested in Congress — suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "'speak . . . with one voice.'" That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. These qualities explain why the Framers listed the traditional avenues of recognition — receiving ambassadors, making treaties, and sending ambassadors — as among the President's Article II powers.

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, or between the courts and the political branches, not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive.

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power.

III

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

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

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

As Justice Jackson wrote in *Youngstown,* when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." Here, the subject is quite narrow:

The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

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

Although the statement required by §214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition.

From the face of §214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. The Court does not question the power of Congress to enact passport legislation of wide scope. In holding §214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

Chief Justice ROBERTS, with whom Justice ALITO joins, dissenting.

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." Youngstown Sheet & Tube Co. v. Sawyer (1952) (Jackson, J., concurring).

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the *powers* granted to him by Article II, Section 2. Indeed, the People

ratified the Constitution with Alexander Hamilton's assurance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government." In short, at the time of the founding, "there was no reason to view the reception clause as a source of discretionary authority for the president." Adler, The President's Recognition Power: Ministerial or Discretionary?

The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, §2. But those authorities are *shared* with Congress, so they hardly support an inference that the recognition power is *exclusive*.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that "Congress has accepted" the President's exclusive recognition power. In any event, we have held that congressional acquiescence is only "pertinent" when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the "conclusive and preclusive" power required to justify defiance of an express legislative mandate.

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. The relevant provision, §214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. The State Department itself has explained that "identification" — not recognition — "is the principal reason that U.S. passports require 'place of birth.'" Congress has not disputed the Executive's assurances that §214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that §214(d) does "not itself constitute a formal act of recognition." Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving §214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." But as just noted, neither

Congress nor the Executive Branch regards §214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

The expansive language in *Curtiss–Wright* casting the President as the "sole organ" of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by §214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step — for the first time in our history — of allowing the President to defy an Act of Congress in the field of foreign affairs.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice ALITO join, dissenting.

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

Before turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. Congress's power to "establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, enables it to grant American citizenship to someone born abroad. The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship — say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government's citizenship records. To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." It thus has the right to decide

that recording birthplaces as "Israel" makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel.

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on.

The Court holds that the Constitution makes the President alone responsible for recognition and that §214(d) invades this exclusive power. I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that "the weight of historical evidence" supports exclusive executive authority over "the formal determination of recognition." But even with its attention confined to formal recognition, the Court is forced to admit that "history is not all on one side."

To know all this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory "are legitimate in the eyes of the United States." Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides.

In the final analysis, the Constitution may well deny Congress power to -recognize — the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else §214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel's sovereignty over Jerusalem.

Under the Constitution they approved, Congress may require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem.

2. Treaties and Executive Agreements

Article II, §2 states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The major constitutional issue that has arisen concerns the authority of the president to use executive agreements rather than treaties for foreign policy commitments. A treaty is an agreement between the United States and a foreign country that is negotiated by the president and is effective when ratified by the Senate.[14] An executive agreement, in contrast, is an agreement between the United States and a foreign country that is effective when signed by the president and the head of the other government. In other words, if the document is labeled "treaty," Senate approval is required. If the document is titled "executive agreement," no Senate ratification is necessary.

Although the Constitution does not mention executive agreements, it is well established that such agreements are constitutional. Indeed, based on past experience, it appears that executive agreements can be used for any purpose; that is, anything that can be done by treaty can be done by executive agreement. Never in American history has the Supreme Court declared an executive agreement unconstitutional as usurping the Senate's treaty-approving function. Even major foreign policy commitments have been implemented through executive agreements. For example, in 1940, the "Destroyer-Bases Agreement" substantially expanded American involvement in World War II when President Roosevelt agreed to loan Great Britain 50 naval destroyers in exchange for the United States receiving free 99-year leases to develop military bases on several sites in the Caribbean and Newfoundland.[15]

The Court has sided with the president each time there has been a challenge to an executive agreement. In United States v. Pink[16] and United States v. Belmont,[17] the Supreme Court upheld an executive agreement, the Litvinov Agreement, whereby the United States recognized the Soviet Union in exchange for the Soviet Union assigning to the United States its interests in a Russian insurance company in New York. The Soviet Union had nationalized the interest in this insurance company in 1918 and 1919. The United States would use these assets to pay claims that it and others had against the Soviet Union.[18]

The Court upheld the executive agreement and explained that because it was not a treaty, Senate approval was not required. New York courts had refused to enforce the Litvinov Agreement, but the Court ruled that states must comply with executive agreements. Executive agreements, like treaties, prevail over state law and policy. Justice Douglas, writing for the Court in *Pink*, explained, "A treaty is a 'Law of the Land' under the supremacy clause [of Article VI] of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."[19] Similarly, in United States v. Belmont, the Court stated that "in the case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."[20]

A more recent example of the Supreme Court upholding an executive agreement was Dames & Moore v. Regan in 1981.

DAMES & MOORE v. REGAN, SECRETARY OF THE TREASURY

453 U.S. 654 (1981)

Justice REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act (hereinafter IEEPA) declared a national emergency on November 14, 1979, and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ." Exec. Order No. 12170.

p. 353

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. The Agreement stated that "[i]t is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable . . . in the courts of any nation in accordance with its laws." Under the Agreement, the United States is obligated "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the

actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. United States v. Pink (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949. The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future.

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In United States v. Pink (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

During the 1940s and 1950s, Senator Bricker proposed a constitutional amendment, known as the Bricker Amendment, that would have prevented the use of executive agreements. The Amendment never was passed by Congress, but it reflects deep concern over the President's ability to circumvent the treaty ratification process by using executive agreements instead.

3. War Powers

The Constitution is an invitation for a struggle between the president and Congress over control of the war power. The Constitution, in Article I, grants Congress the power to declare war and the authority to raise and support the army and the navy. Article II makes the president the commander in chief.

Basic, unresolved questions exist concerning these powers. First, what constitutes a declaration of war? Must it be a formal declaration of war, such as was adopted by Congress after the bombing of Pearl Harbor to authorize America's entry into World War II? Or may it be less explicit? For example, was the Gulf of Tonkin Resolution, which authorized the use of military force in Southeast Asia, sufficient to constitute a declaration of war for the Vietnam War? Might even repeated congressional approval of funding for a war be regarded as sufficient even without passage of a resolution explicitly approving the war?

Second, when may the president use American troops in hostilities without congressional approval? To what extent does the president's power as commander in chief authorize the use of troops in foreign countries without a formal declaration of war? Neither of these questions ever has been clearly answered by the Supreme Court. In fact, given the Court's view that such foreign policy disputes constitute a political question, answers are unlikely to come from the judiciary.

Thus, the Supreme Court rarely has spoken as to the constitutionality of the president using troops in a war or warlike circumstances without congressional approval. In fact, the only Supreme Court case to address the issue was in the unique context of the Civil War and the actions of the president to deal with the rebellion. In the *Prize Cases*, the Court ruled that the president had the power to impose a blockade on Southern states without a congressional declaration of war.[21] No other Supreme Court case has addressed the constitutionality of presidential war making without a congressional declaration of war. Therefore, little exists in the way of law regarding the circumstances in which the president may use troops without congressional approval or as to what Congress may do to suspend American involvement in a war.

In 1973, Congress adopted the War Powers Resolution to address these two questions.[22] The War Powers Resolution was a response to the Vietnam War in which two presidents, Lyndon Johnson and Richard Nixon, fought a highly unpopular war with great cost in lives and dollars without a formal declaration of war from Congress.

50 U.S. CODE CHAPTER 33 — WAR POWERS RESOLUTION

§1541. Purpose and policy

(a) Congressional declaration

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) Presidential executive power as Commander-in-Chief; limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

§1542. Consultation; initial and regular consultations

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

§1543. Reporting requirement

(a) Written report; time of submission; circumstances necessitating submission; information reported

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced —

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported

The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports; semiannual requirement

Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

§1544. Congressional action

(a) Transmittal of report and referral to Congressional committees; joint request for convening Congress

Each report submitted pursuant to section 1543(a)(1) of this title shall be transmitted to the Speaker of the House of Representatives and to the

President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. . . .

(b) Termination of use of United States Armed Forces; exceptions; extension period

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

§1547. Interpretation of joint resolution

(a) Inferences from any law or treaty

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is

intended to constitute specific statutory authorization within the meaning of this chapter.

(c) Introduction of United States Armed Forces

For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

§1548. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby.

The constitutionality of the War Powers Resolution has not been tested. In 1999, Representative Tom Campbell brought a lawsuit arguing that the bombing of Yugoslavia was in violation of the War Powers Resolution. The United States District Court for the District of Columbia dismissed the case for lack of standing and the United States Court of Appeals for the District of Columbia Circuit affirmed. Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000). In 2003, a lawsuit was brought to have the impending war in Iraq declared unconstitutional. It, too, was dismissed as nonjusticiable. Doe v. Bush, 323 F.3d 133 (1st Cir. 2003). It is quite possible that every challenge to a president's actions as violating the War Powers Resolution will be dismissed on justiciability grounds, either for lack of standing or as a political question.

Nonetheless, the underlying constitutional issue remains: Is the War Powers Resolution an unconstitutional intrusion on the president's powers as commander in chief? Or is the War Powers Resolution a permissible effort by Congress to interpret the Constitution and ensure checks and balances?

D. PRESIDENTIAL POWER AND THE WAR ON TERRORISM

The tragic events of September 11, 2001, have led to many government actions that will raise important difficult constitutional questions: Is the indefinite detention of "unlawful combatants" constitutional? Are secret deportation proceedings constitutional? Is it permissible for the government to hold individuals indefinitely as "material witnesses"? Are provisions of the USA Patriot Act, which include expanded authorization for electronic eavesdropping by the government, constitutional?

The materials below consider two issues: When may the executive detain U.S. enemy combatants, and when, if at all, are military tribunals constitutional?

1. Detentions

In June 2004, the Supreme Court decided three major cases concerning civil liberties and the war on terrorism. Two were resolved largely on nonconstitutional grounds. In Rasul v. Bush, 542 U.S. 466 (2004), the Supreme Court held that detainees being held at Guantanamo Bay, Cuba, had a right to have their habeas corpus petition heard in a federal court. In Padilla v. Rumsfeld, 542 U.S. 426 (2004), the Court held that an American citizen, apprehended in the United States and held as an enemy combatant in a military prison in South Carolina, could not present a habeas corpus petition in federal court in New York, where he was earlier held. Rather, the habeas petition needed to be refiled in South Carolina.

But in Hamdi v. Rumsfeld, below, the Court considered whether an American citizen apprehended in a foreign country could be indefinitely detained as an enemy combatant without any form of due process. By a five-to-four margin, though without a majority opinion, the Court ruled that there was sufficient legal authority to detain Hamdi as an enemy combatant. But the Court, by an eight-to-one margin, concluded that Hamdi must be accorded due process, including a meaningful factual hearing. In October 2004, Hamdi was released from custody after agreeing to renounce his U.S. citizenship, not take up arms against the United States, and not to return to this country.

HAMDI v. RUMSFELD

542 U.S. 507 (2004)

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

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

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines

planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

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

II

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

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U.S.C. §4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed §4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II.

The Government again presses two alternative positions. First, it argues that §4001(a) applies only to "the control of civilian prisons and related detentions," not to military detentions. Second, it maintains that §4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress" — the [Authorization for Use of Military Force]. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied §4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that §4001(a) applies to military detentions).

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

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin.* The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. [I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress's grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan (1866) does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military

tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.[23]

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III

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

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. Only in the rarest of circumstances has Congress seen fit to suspend the writ. All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention.

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

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States." Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one.

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in Mathews v. Eldridge (1976). *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards." We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," is the most elemental of liberty interests — the interest in being free from physical detention by one's own government. Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection," and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual. Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat

to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.

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

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker. These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner

meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

The plurality accept[s] the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by §4001(a), that is, by the Authorization for Use of Military Force. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even

on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

[I]

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification, the answer has to be no. For a number of reasons, the prohibition within §4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

First, the circumstances in which the Act was adopted point the way to this interpretation. The provision superseded a cold-war statute, the Emergency Detention Act of 1950, which had authorized the Attorney General, in time of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in Korematsu v. United States (1944). The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us §4001(a) provides a powerful reason to think that §4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. Congress's understanding of the need for clear authority before citizens are kept detained is itself therefore clear, and §4001(a) must be read to have teeth in its demand for congressional authorization.

Finally, even if history had spared us the cautionary example of the internments in World War II, there would be a compelling reason to read §4001(a) to demand manifest authority to detain before detention is authorized. The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51. Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

Since the Government has given no reason either to deflect the application of §4001(a) or to hold it to be satisfied, I need to go no further; the Government hints of a

constitutional challenge to the statute, but it presents none here. I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military. Youngstown Sheet & Tube Co. v. Sawyer (1952) (concurring opinion) (presidential authority is "at its lowest ebb" where the President acts contrary to congressional will).

There may be room for one qualification to Justice Jackson's statement, however: in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people (though I doubt there is any want of statutory authority). This case, however, does not present that question, because an emergency power of necessity must at least be limited by the emergency; Hamdi has been locked up for over two years.

Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of §4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by "the law of the land."

[II]

Because I find Hamdi's detention forbidden by §4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that §4001(a) is unconstitutional.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

Justice SCALIA, with whom Justice STEVENS joins, dissenting.

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

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

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*

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

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods. Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Suspension Clause was by design a safety valve, the Constitution's only "express provision for exercise of extraordinary authority because of a crisis."

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ — which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the

plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

Justice THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioner's habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of Mathews v. Eldridge (1976). I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so. The Authorization for Use of Military Force (AUMF) authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

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

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

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

In October 2006, Congress passed and President Bush signed the Military Commission Act of 2006. Among other things, the act provides that noncitizens held as enemy combatants shall not have access to federal court via a writ of habeas corpus. Instead, they must go through military proceedings and then seek review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit is limited to hearing claims under the Constitution and federal statutes; it cannot hear claims under treaties such as the Geneva Accords. The Military Commission Act creates express statutory authority for military commissions and defines their procedures.

Boumediene v. Bush held that the denial of access to habeas corpus is an unconstitutional suspension of the writ of habeas corpus. Underlying the majority and the dissenting opinions are very different views about the appropriate role of the judiciary in the war on terror.

BOUMEDIENE v. BUSH

553 U.S. 723 (2008)

Justice KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA) operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to

prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In Hamdi v. Rumsfeld (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. We granted certiorari and reversed, holding that 28 U.S.C. §2241 extended statutory habeas corpus jurisdiction to Guantanamo. See Rasul v. Bush (2004). After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of §1005 of the DTA amended 28 U.S.C. §2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs.

In Hamdan v. Rumsfeld (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA.

II

As a threshold matter, we must decide whether MCA §7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold

the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U.S.C.A. §2241(e) now provides:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in [§1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Section 7(b) of the MCA provides the effective date for the amendment of §2241(e). It states: "The amendment made by [MCA §7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that non- citizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been

insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, §9, cl. 2. The word "privilege" was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term "right" in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, §8, cl. 8.) Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect.

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains de jure sovereignty over

Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.

Practical considerations weighed heavily as well in Johnson v. Eisentrager (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time.

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. The Court's further determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding.

Second, because the United States lacked both de jure sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. The Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States' lack of formal

legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. De jure sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." Marbury v. Madison (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting

> outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." The Government's evidence is accorded a presumption of validity. The detainee is allowed to present "reasonably available" evidence, but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.'"

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided

adequate substitute procedures for habeas corpus.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained — though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant — as the parties have and as we do — or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence — the only requirement is that the tribunal deem the evidence "relevant and helpful," — the detainee's opportunity to question witnesses is likely to be more theoretical than real.

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty

shell." Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete.

Although we do not hold that an adequate substitute must duplicate §2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA §7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition.

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful

restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation- of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

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

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in Rasul v. Bush (2004) held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years. Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some

reasonable period of time. These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

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

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus — its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with Justice Scalia's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

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Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D.C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right — one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will

have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat — precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to challenge the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190-8, the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas court. The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. If the CSRT finds a particular detainee has been improperly held, it can order release.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Given the statutory scheme the political branches adopted, and given *Hamdi*, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures — coupled with the judicial review specified by the DTA — provide the "basic process" *Hamdi* said the Constitution affords American citizens detained as enemy combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ "'as it existed in 1789.'" The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient — it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. The DTA system — CSRT review of the Executive's determination followed by D.C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process — meets these criteria.

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should generally refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled "habeas"? Will the location of most of these witnesses change — will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

- The right to hear the bases of the charges against them, including a summary of any classified evidence.
- The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process.

- The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
- The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
- Before the D.C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees — whether citizens or aliens — in our national history.

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit — where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine — through democratic means — how best" to balance the security of the American people with the detainees' liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. The Chief Justice's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers

in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant abandonment of such a principle that produces the decision today. The President relied on our settled precedent in Johnson v. Eisentrager (1950), when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. See S.Rep. No. 110-90, pt. 7, p. 13 (2007) (Minority Views of Sens. Kyl, Sessions, Graham, Cornyn, and Coburn) (hereinafter Minority Report). Some have been captured or killed. See also Mintz, Released Detainees Rejoining the Fight, Washington Post, Oct. 22, 2004, pp. A1, A12. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Still another murdered an Afghan judge. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq. See White, Ex-Guantanamo Detainee Joined Iraq Suicide Attack, Washington Post, May 8, 2008, p. A18.

These, mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As The Chief Justice's dissent makes clear, we have no idea

what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court is clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

And today it is not just the military that the Court elbows aside. A mere two Terms ago in Hamdan v. Rumsfeld (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following: "Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary."

Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive — both political branches — have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. As the Solicitor General argued, "the Military Commissions Act and the Detainee Treatment Act . . . represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach

of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in Johnson v. Eisentrager. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

Boumediene was decided in June 2008. Since then, the Court has denied every petition for a writ of certiorari from a Guantanamo detainee. Overall, 780 individuals have been held at Guantanamo and 40 remain as of the summer of 2019.

2. Military Tribunals

In November 2001, President Bush issued an order for military tribunals. The order for military tribunals raises many basic questions: Does the president, as commander in chief, have the authority to create military tribunals or is creating courts entirely a congressional power under the Constitution? Can the government suspend provisions of the Bill of Rights in trying noncitizens accused of terrorism or supporting terrorism? More generally, how should the Constitution be interpreted during wartime?

There is one major Supreme Court decision concerning military tribunals prior to the current era: *Ex parte Quirin*, from World War II.

EX PARTE QUIRIN, 317 U.S. 1 (1942): Chief Justice STONE delivered the opinion of the Court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed. All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt

came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared that “all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.”

The Proclamation also stated in terms that all such persons were denied access to the courts. Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. [W]e have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. But the detention and trial of petitioners — ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger — are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end the Constitution gives to Congress the power to "provide for the common Defence," Art. I, §8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, §8, cls. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, §8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," Art. I, §8, cl. 10. And finally the Constitution authorizes Congress "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." Art. I, §8, cl. 18.

The Constitution confers on the President the "executive Power," Art II, §1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, §3. It makes him the Commander in Chief of the Army and Navy, Art. II, §2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. H, §3, cl. 1.

By the Articles of War, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. *See* Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commission . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

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From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it

may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*, supra. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing “the crime of piracy as defined by the law of nations” is an appropriate exercise of its constitutional authority, Art. I, §8, cl. 10, “to define and punish” the offense since it has adopted by reference the sufficiently precise definition of international law. Similarly by the reference in the 15th Article of War to “offenders or offenses that . . . by the law of war may be triable by such military commissions,” Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those

who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars. During the Civil War the military commission was extensively used for the trial of offenses against the law of war. By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is p. 393
without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and

with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered — or, having so entered, they remained upon — our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, §3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, §2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, §2 of Article III, the Judiciary Article, had provided: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” and had directed that “such Trial shall be held in the State where the said Crimes shall have been committed.”

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of §2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right. The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, §2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within the provisions of the Fifth and Sixth Amendments relating to “crimes” and “criminal prosecutions.” In the light of this long-continued and consistent interpretation we must conclude that §2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts. It has not hitherto been challenged, and so far as we are advised it has never been suggested in

the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different — to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments — whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary — as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge.

In June 2006, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Court ruled, by a 5-3 margin, that the military tribunals provided pursuant to an Executive Order by President Bush were invalid. The Court found that the procedures violated the Uniform Code of Military Justice and the Geneva Accords. The Court did not consider the constitutional issues raised. Congress responded by enacting the Military Commission Act of 2006. The procedures ordered under it have not yet been ruled upon by the Supreme Court, though the Court invalidated the restrictions on habeas corpus in the Act in Boumediene v. Bush, above.

E. PRESIDENTIAL POWER OVER IMMIGRATION

In considering the constitutionality of President Trump's travel ban, the Supreme Court expressed the view that the President has broad powers as to immigration and that only a rational basis test is to be used for restrictions on immigration. Under rational basis review, a court asks only whether there is a conceivable permissible purpose for the government's action; its actual purpose is irrelevant. The Court found national security to

be a conceivable permissible purpose, whereas the dissent focused on what it saw as the actual purpose: a ban on Muslims entering the United States.

TRUMP v. HAWAII

138 S. Ct. 2392 (2018)

Chief Justice ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States." Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries — Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen — that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order.

In response, the President revoked EO-1, replacing it with Executive Order No. 13780, which again directed a worldwide review. Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO-2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. The temporary restrictions in EO-2 expired before this Court took any action, and we vacated the lower court decisions as moot.

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us — Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public safety threats." To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries — Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen — remained deficient in terms of their risk profile and willingness to provide requested information. The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

[II]

The text of [8 U.S.C.] §1182(f) states:

> "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate").

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here.

Plaintiffs' final statutory argument is that the President's entry suspension violates §1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." In any event, we reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA.

The distinction between admissibility — to which §1152(a)(1)(A) does not apply — and visa issuance — to which it does — is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end.

Common sense and historical practice confirm as much. Section 1152(a)(1)(A) has never been treated as a constraint on the criteria for admissibility in §1182. Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality.

IV

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims.

Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. 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." Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right."

One week after his inauguration, the President issued EO-1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country."

Plaintiffs also note that after issuing EO-2 to replace EO-1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." More recently, on November 29, 2017, the

President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements — many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive."

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.

"[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. 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."

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national

security is highly constrained. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

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."

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.

Finally, the 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."

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim. Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion.

Justice KENNEDY, concurring.

I join the Court's opinion in full. In all events, it is appropriate to make this further observation. 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.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

Justice BREYER, with whom Justice KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i.e.,* about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation's lawfulness.

Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment

claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban," rather than a "security-based" ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, *i.e.,* that the Government is not applying the Proclamation as written. An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

Amici have suggested that there are numerous applicants who could meet the waiver criteria. Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018.

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

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 facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I

Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.

The Establishment Clause forbids government policies "respecting an establishment of religion." The "clearest command" of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. "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." 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.

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "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" the decisionmaker.

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." That statement remained on his campaign website until May 2017 (several months into his Presidency).

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. In January 2016, during a

Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." He answered, "No." A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim." That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things."

As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim."

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." He replied: "You know my plans. All along, I've proven to be right."

On January 27, 2017, one week after taking office, President Trump signed entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." That same day, President Trump explained to the media that, under EO-1, Christians would be given priority for entry as refugees into the United States. The following day, one of President Trump's key advisers candidly drew the connection between EO-1 and the "Muslim ban" that the President had pledged to implement if elected. According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

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. Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific — but stupidly, that would not be politically correct!" . . . On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!"

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. 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. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint.

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.

II

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "'inexplicable by anything but animus.'"

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

[III]

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, "[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." Instead of vindicating those principles, today's decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece,* where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece,* where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "'that they are outsiders, not full members of the political community.'"

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of Korematsu v. United States (1944). In *Korematsu,* the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia,* a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.

Because the Court's decision today has failed in that respect, with profound regret, I dissent.

F. CHECKS ON THE PRESIDENT

How can the president be held accountable? Undoubtedly, some of the most important mechanisms are informal, such as through the pressure of public opinion and checks by Congress, such as through the budget process. Two primary formal mechanisms exist: civil suits and criminal proceedings against the president, and impeachment.

1. Suing and Prosecuting the President

When may the president of the United States be civilly sued? There have been two Supreme Court cases dealing with this issue, Nixon v. Fitzgerald and Clinton v. Jones. The former established absolute immunity — complete protection from civil suit — for a president for all official actions while in office. The latter rejected any immunity for acts that occur before a president takes office.

RICHARD NIXON v. A. ERNEST FITZGERALD

457 U.S. 731 (1982)

Justice POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

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I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the Armed Forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the Presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A transport plane could approximate $2 billion. He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Fitzgerald's proposed reassignment encountered resistance within the administration. In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "'Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.'" Butterfield therefore recommended that "'[W]e should let him bleed, for a while at least.'" There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

At a news conference on January 31, 1973, the President was asked about [Fitzgerald's firing]. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee.

[II]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

The President occupies a unique position in the constitutional scheme. Article II, §1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the

United States. . . .” This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law — it is the President who is charged constitutionally to “take Care that the Laws be faithfully executed”; the conduct of foreign affairs — a realm in which the Court has recognized that “[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret”; and management of the Executive Branch — a task for which “imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.”

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. We find these cases to be inapposite. The President’s unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges — for whom absolute immunity now is established — a President must concern himself with matters likely to “arouse the most intense feelings.” Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official “the maximum ability to deal fearlessly and impartially with” the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President’s office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President “above the law.” For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

Justice White, with whom Justice Brennan, Justice Marshall, and Justice Blackmun join, dissenting.

In Marbury v. Madison (1803), the Court, speaking through the Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the Government.

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the Government itself and against Government officials, but only when the suit against the latter actually seeks relief against the sovereign. Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.

In Marbury v. Madison, the Chief Justice, speaking for the Court, observed: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In Scheuer v. Rhodes (1974), a unanimous Court held that the Governor of a State was entitled only to a qualified immunity.

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

WILLIAM JEFFERSON CLINTON v. PAULA CORBIN JONES

520 U.S. 681 (1997)

Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

I

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and reelected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. As the case comes to us, we are required to assume the truth of the detailed — but as yet untested — factual allegations in the complaint.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent — working as a state employee — staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent" sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Respondent seeks actual damages of $75,000, and punitive damages of $100,000.

II

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved.

Petitioner's principal submission — that "in all but the most exceptional cases," the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office — cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against Theodore Roosevelt and Harry Truman had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations. Two companion cases arising out of an automobile accident were filed against John F. Kennedy in 1960 during the Presidential campaign. After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940. The motion for a stay was denied by the District Court, and the matter was settled out of court. Thus, none of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their

designated functions effectively without fear that a particular decision may give rise to personal liability.

This reasoning provides no support for an immunity for unofficial conduct. As we explained in *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent. Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that — given the nature of the office — the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former presidents, from George Washington to George Bush, have consistently endorsed petitioner's characterization of the office. It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that — as a by-product of an otherwise traditional exercise of judicial power — burdens will be placed on the President that will hamper the performance of his official duties. Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." If the Judiciary may

severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition — especially in matters involving national security — of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims.

No case has addressed whether a sitting President can be criminally prosecuted. In March 1974, a federal grand jury considered indicting then-President Richard Nixon and decided instead to declare him an unindicted co-conspirator because it was unsure whether it could indict a sitting President. During the Clinton presidency, there was much discussion as to whether he could be criminally indicted for perjury while in office. This did not occur, either because the Independent Counsel believed that the President had immunity from criminal prosecution or because of a judgment about the merits of the case.

In the spring of 2019, special counsel Robert Mueller, who was investigating possible illegal activities by President Trump, said that he was bound by a Justice Department regulation that prevents indicting a sitting President. Moreover, he said that because

Trump could not be indicted, Mueller could not express any views as to whether Trump had engaged in illegal activity. He said that he was not "exonerating" Trump; rather, he deemed it inappropriate to express an opinion about whether Trump had committed illegal acts.

On the one hand, there is a strong argument that impeachment and removal should be the sole remedy against a President. The danger is that criminal prosecution inevitably would interfere with the President's ability to perform and that the impeachment process is the appropriate remedy for wrongdoing. On the other hand, no principle is more basic than that no person is above the law. This justifies allowing the President, like all others, to be charged and tried for crimes.

2. Impeachment

The ultimate check on presidential power is impeachment and removal. Article II, §4 of the Constitution provides, "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 I, §2 provides that the House of Representatives has the sole power to impeach. If there is an impeachment by the House, then a trial is held in the Senate. Article I, §3 gives the Senate the sole power to try impeachments and prescribes that "no Person shall be convicted without the Concurrence of two thirds of the Members present."

Two major issues remain unresolved concerning these provisions. First, what are "high Crimes and Misdemeanors"? At one end of the spectrum is the view that these are limited to acts that violate the criminal law and that can be deemed a serious threat to society.[24] At the opposite pole is the statement of Gerald Ford, who was a congressman from Michigan when he proposed the impeachment of Supreme Court Justice William Douglas largely because of Douglas's liberal views: "[A]n impeachable offense is whatever a majority of the House of Representatives considers [it] to be."[25]

Second, what procedures must be followed when there is an impeachment and removal proceeding? For example, is it permissible for the Senate to have a committee hear the evidence and make a recommendation to the entire body, or must the Senate sit as a tribunal to hear the case?

There is no definitive answer to either of these questions.[26] There is no Supreme Court case addressing either. In fact, none is likely in the future because the Supreme Court has held that challenges to the impeachment and removal process pose nonjusticiable political questions.[27]

Although there are not judicial precedents to guide Congress, there is historical experience. Three times there have been serious efforts to impeach the president, and two presidents have been impeached.

Andrew Johnson was the first president to be impeached. He was impeached in 1867 for firing Secretary of War Edwin Stanton in violation of the Tenure in Office Act.[28] After the end of the Civil War, Congress became increasingly frustrated with Johnson, a Southerner from Tennessee, presiding over Reconstruction. Congress adopted the

Tenure in Office Act of 1867 to keep Johnson from firing Lincoln's cabinet. The act declared that such a firing would be deemed a "high misdemeanor," indicating that Congress was considering the possibility of impeachment from the outset. The Supreme Court subsequently held that the Tenure in Office Act violated separation of powers.[29] Nonetheless, the House impeached and Johnson avoided removal by just one vote in the Senate.

The second serious attempt to impeach a president occurred in 1974 and was directed against Richard Nixon. The House Judiciary Committee voted three articles of impeachment. One was for obstruction of justice in connection with the Watergate cover-up; one was for using government agencies, such as the FBI and the IRS, for political advantages; and the final article was for failing to comply with subpoenas. Before the matter could be considered by the entire House, Nixon resigned.

Most recently, of course, President Bill Clinton was impeached by the House of Representatives in 1998, but the Senate did not convict him. A short version of a long story begins after the Supreme Court decided Clinton v. Jones, above, and allowed Paula Jones's civil suit against Bill Clinton to proceed. The U.S. District Court then allowed Jones's attorney to depose President Clinton and permitted questions to be asked about Clinton's other sexual relationships.

Monica Lewinsky, a former White House aide, had described to her friend Linda Tripp a sexual relationship that Lewinsky had with the president that included many phone calls, private meetings, phone sex, and oral sex. Tripp informed Jones's lawyers of this, and on the eve of Clinton's deposition in the *Jones* case, Tripp secretly met for hours with lawyers for Jones and briefed them about Lewinsky.

On January 17, 1998, Clinton's deposition was taken and he was asked about Lewinsky. Below is the key part of Clinton's statement during the deposition:

Q: Did you have an extramarital sexual affair with Monica Lewinsky?

Clinton: No.

Q: If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

Clinton: It's certainly not the truth. It would not be the truth.

Q: I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?

Bennett: I object because I don't know that he can remember —

J. Wright: Well, it's real short. He can — I will permit the question and you may show the witness definition number one.

Clinton: I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

The possibility that the president had committed perjury was brought to the attention of Attorney General Janet Reno. She authorized Independent Counsel Kenneth Starr, who was investigating the Whitewater land scandal for possible presidential involvement, to broaden his investigation to consider whether the president had committed perjury or

obstructed justice. Starr conducted a lengthy investigation, including having the president testify before a grand jury.

On August 17, 1998, Clinton testified before the grand jury. His testimony later became the basis for a separate accusation of perjury. In his grand jury testimony, President Clinton refused to answer any specific questions of a sexual nature about his relationship with Monica Lewinsky; instead, he read and referred to the following prepared statement:

> When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse; they did not constitute "sexual relations" as I understood that term to be defined at my January 17, 1998, deposition; but they did involve inappropriate intimate contact. These inappropriate encounters ended, at my insistence, in early 1997. . . .
>
> While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the Office I hold, this is all I will say about the specifics of these particular matters.

President Clinton did engage in extended hypothetical and definitional discussions as to what would or would not constitute sexual relations or fall within his definition of the term "sexual relations." The following was the most important exchange, with Clinton answering the questions:

A: You are free to infer that my testimony is that I did not have sexual relations, as I understood this term to be defined.

Q: Including touching her breast, kissing her breast, or touching her genitalia?

A: That's correct.

In the fall of 1998, Independent Counsel Kenneth Starr released a very detailed report documenting the relationship between Monica Lewinsky and Bill Clinton. The report described the progress of their relationship, many phone calls over a long period of time, sexual touchings, and oral sex. The House Judiciary Committee then conducted impeachment hearings and voted four articles of impeachment against the president. The vote in the House Judiciary Committee was entirely along partisan lines, with all of the Republican members voting for impeachment and the Democrats voting against.

The first article of the articles of impeachment stated:

> In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States . . . has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice [through his perjury before

the grand jury concerning this prior relationship with an intern and his prior sworn testimony]. . . .

In doing this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.[30]

Article Two stated:

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice [through acts of deception and perjury]. . . .[31]

Article Three stated:

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding. . . .[32]

Article Four stated:

Using the powers and influence of the office of President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has engaged in conduct that resulted in misuse and abuse of his high office, impaired the due and proper administration of justice and the conduct of lawful inquiries, and contravened the authority of the legislative branch and the truth seeking purpose of a coordinate investigative proceeding, in that, as President, William Jefferson Clinton refused and failed to respond to certain written requests for admission and willfully made perjurious, false and misleading sworn statements in response to certain written requests for admission propounded to him as part of the impeachment inquiry. . . .[33]

On December 19, 1998, the House of Representatives passed two articles of impeachment. The first article passed by a vote of 228-206, with five Democrats defecting to vote for impeachment and five Republicans defecting to vote against impeachment. Article Three passed by a vote of 221-212, with five Democrats defecting to vote for impeachment and five Republicans defecting to vote against impeachment. On Article Two, alleging perjury in the civil deposition, 28 Republicans crossed party lines to vote against the article, defeating the article 205-229. On Article Four, alleging perjury in the president's answer to Congress, 81 Republicans crossed party lines in favor of the president, while one Democrat crossed party lines in favor of Article Four, for a final vote of 148-285.

The U.S. Senate then conducted a trial of President Clinton on the two articles of impeachment. The Chief Justice of the United States, as prescribed by the Constitution, presided. In accord with Senate rules, the senators' deliberations were entirely in closed session. Neither article of impeachment received the two-thirds vote needed to remove the president.

It is unclear what lesson is to be learned from any of these experiences concerning what constitutes "high crimes and misdemeanors." All of these instances were highly partisan, and all raise the fundamental question of what should be regarded as an impeachable offense.

Notes

1 Alexander Hamilton, First Letter of *Pacificus* (June 29, 1793), reprinted in William M. Goldsmith, *The Growth of Presidential Power: A Documented History* 398, 401 (1974).

2 James Madison, The First letter of *Helvidius*, reprinted in W. Goldsmith, *supra* note 1, at 405.

3 Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Colum. L. Rev. 53, 53 (1953).

4 Line Item Veto Act (Act), 110 Stat. 1200, 2 U.S.C. §691.

5 The Court also found the law unconstitutional as exceeding the scope of Congress's Commerce Clause authority. This aspect of the decision is discussed in Chapter 2. [Footnote by casebook author.]

6 *See*, *e.g.*, National Cable Television Assn. v. United States, 415 U.S. 336 (1974).

7 INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting).

8 For a detailed description of the facts of this impeachment, *see* Raoul Berger, *Impeachment: The Constitutional Problem* (1973).

9 *See* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.J. 467, 493-494 (1946).

10 Charles A. Lofgren, *United States v. Curtiss-Wright Export Corp.: A Historical Reassessment*, 83 Yale L.J. 1, 32 (1973).

11 101 Stat. 1011 (1987).

12 *See* Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters* (1993); Michael Arthur Ledeen, *Perilous Statecraft: An Insider's Account of the Iran-Contra Affair* (1988).

13 Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 100-216, H. Rep. No. 100-433 (1987) at 473 (minority report).

14 For an argument that there is a new form of presidential-congressional international agreement, approved by both houses of Congress but not requiring approval of two-thirds of the Senate, *see* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799 (1995); *but see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995) (strongly objecting to such an approach).

15 Richard W. Leopold, *The Growth of American Foreign Policy*, 565-566 (1962).

16 315 U.S. 203 (1942).

17 301 U.S. 324 (1937).

18 In *Pink*, the Court also rejected a claim that the agreement was an impermissible taking of property without just compensation in violation of the Fifth Amendment. The Court noted that the Litvinov Agreement did not bar compensation for claims, although it did give the United States priority as a creditor.

19 315 U.S. at 230.

20 301 U.S. at 331.

21 67 U.S. (2 Black) 635 (1862).

22 50 U.S.C. §1541. Although it is called "The War Powers Resolution," it is a properly adopted federal statute.

23 Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them. [Footnote by the Court.]

24 *See* Charles L. Black, Jr., *Impeachment: A Handbook* 39-40 (1974) (a violation of the criminal law is not essential, but a good indicator of a high crime or misdemeanor).

25 116 Cong. Rec. 11913 (1970).

26 For an excellent scholarly treatment of these and other issues surrounding impeachment, *see* Michael J. Gerhardt, *The Federal Impeachment Process* (2d ed. 2000).

27 *See* Nixon v. United States, 506 U.S. 224 (1993) (dismissing as a political question a suit brought by federal district court Judge Walter Nixon objecting to the Senate assigning a committee the

responsibility of hearing the evidence against him following impeachment by the House of Representatives).

28 *See, e.g.*, Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (1973); Milton Lomask, *Andrew Johnson: President on Trial* (1973); Gene Smith, *High Crimes and Misdemeanors: The Impeachment and Trial of Andrew Johnson* (1977); Gerhardt, *supra* note 26, at 10 n.30.

29 Myers v. United States, 272 U.S. 52 (1926) (included earlier in this chapter).

30 H.R. Res. 611, 105th Cong. (1998) (enacted), reprinted in 144 Cong. Rec. H11, 11774 (daily ed. Dec. 18, 1998). The second paragraph was repeated in each of the four articles of impeachment.

31 *Id.*, reprinted in 144 Cong. Rec. H11, 11774 (daily ed. Dec. 18, 1998).

32 *Id.*, reprinted in 144 Cong. Rec. H11, 11774-11775 (daily ed. Dec. 18, 1998).

33 *Id.*, reprinted in 144 Cong. Rec. H11, 11774-11775 (daily ed. Dec. 18, 1998).

CHAPTER 4

Limits on State Regulatory and Taxing Power

Bibb, Director, Department of Public Safety of Illinois v. Navajo Freight Lines, Inc.

Western & Southern Life Insurance Co. v. State Board of Equalization of California

Reeves, Inc. v. William Stake

South-Central Timber Development, Inc. v. Commissioner, Department of Natural Resources of Alaska

C. The Privileges and Immunities Clause of Article Iv, §2

Toomer v. Witsell

United Building & Construction Trades Council of Camden County v. Mayor & Council of the City of Camden

Lester Baldwin v. Fish & Game Commission of Montana

Supreme Court of New Hampshire v. Kathryn A. Piper

This chapter focuses on limits on state power that derive from the existence of a national government and of other states. There are two possibilities when considering whether a state or local law is invalidated because of these restrictions. One situation is where Congress has acted. If Congress has passed a law and it is a lawful exercise of congressional power, the question is whether the federal law preempts state or local law. Article VI of the Constitution provides that the "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." Because of the Supremacy Clause, if there is a conflict between federal law and state or local law, the latter is deemed preempted.

The other situation is where Congress has not acted—or at least the judiciary decides that federal law does not preempt state or local law. Nonetheless, even though there is not preemption, state and local laws can be challenged under two principles: the dormant Commerce Clause and the Privileges and Immunities Clause. The dormant Commerce Clause, or as it sometimes called, "the negative Commerce Clause," is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. The Supreme Court has inferred this limit on state regulatory power from the grant of power to Congress to regulate commerce among the states. Even if Congress has not acted, even if its commerce power lies dormant, state and local governments cannot place an undue burden on interstate commerce.

Another basis for attacking state and local laws in the absence of preemption is the Privileges and Immunities Clause of Article IV, §2. This provision states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Supreme Court has interpreted the Privileges and Immunities Clause as limiting the ability of states to discriminate against out-of-staters with regard to constitutional rights or important economic activities. Almost all of the recent Supreme Court cases applying the Privileges and Immunities Clause have involved challenges to state and local laws that discriminate against out-of-staters with regard to their ability to earn a livelihood.

A central issue throughout this chapter is the appropriate degree of judicial oversight or of judicial deference to state and local governments. At one extreme, it is possible to argue that state and local governments should be unfettered by the federal government as much as possible. From this view, preemption should be restricted to those situations

where Congress has expressly preempted state and local laws. Also from this view, there should be no dormant Commerce Clause or only a very narrow one. State and local regulation generally should be limited only if Congress clearly precludes state and local actions.

At the other extreme, some argue that it is essential for the judiciary to preserve the federal nature of American government. From this perspective, preemption is not something to avoid; rather, preemption should be found whenever doing so will better effectuate the interests of federal law and of the federal government. Likewise, the dormant Commerce Clause is an essential restriction on abuses by state governments so as to preserve a free flow of goods and services throughout the economy.

Thus, the material in this chapter is very much about federalism. What is the appropriate and desirable allocation of power between the federal government and the states and also among the state governments? What is the proper role of the judiciary in reviewing state and local regulations?

A. PREEMPTION OF STATE AND LOCAL LAWS

As described above, Article VI of the Constitution contains the Supremacy Clause, which provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. If there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice John Marshall said, "[A]cts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because][i]n every such case, the act of Congress . . . is supreme; and the law of State, though enacted in the exercise of powers not controverted, must yield to it." Much more recently the Supreme Court declared, "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" Gade v. National Solid Wastes Management Association (1992).

The difficulty, of course, is in deciding whether a particular state or local law is preempted by a specific federal statute or regulation. As in so many other areas of constitutional law, there is no clear rule for deciding whether a state or local law should be invalidated on preemption grounds. The Supreme Court once remarked that there is not "an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."[1]

Traditionally, the Supreme Court has identified two major situations where preemption occurs. One is where a federal law expressly preempts state or local law. The other situation is where preemption is implied by a clear congressional intent to preempt state or local law.

In Gade v. National Solid Wastes Management Assn., the Court summarized the tests for preemption:

> Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Although these categories, or minor variations, are frequently used, they are not distinct. For example, even if there is statutory language expressly preempting state law, Congress rarely is clear about the scope of what is preempted or how particular situations should be handled. Courts must decide what is preempted, and this inevitably leads to an inquiry into congressional intent. Conversely, implied preemption is often a function of both perceived congressional intent and the language used in the statute or regulation.

The Supreme Court has recognized that in both express and implied preemption the issue is discerning congressional intent. The Court has said that "[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent."[2] It has remarked that "'[t]he purpose of Congress is the ultimate touchstone' in every preemption case."[3] The problem, of course, is that Congress's intent, especially as to the scope of preemption, is rarely expressed or clear. Therefore, although the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.

For the sake of clarity, this section is organized parallel to the test for preemption articulated by the Supreme Court in Gade v. National Solid Wastes Management that is quoted above and that has been frequently repeated by the Court.[4] There are two major situations where preemption is found. First, express preemption occurs where there is explicit preemptive language. Second, there is implied preemption. The Court has identified three types of implied preemption, though the categories are not always kept distinct by the Court. One type of implied preemption is where there is a conflict between federal and state law. For example, even if federal law does not expressly preempt state law, preemption will be found where "compliance with both federal and state regulations is a physical impossibility."[5]

Second, implied preemption also will be found if state law impedes the achievement of a federal objective. Even if federal and state law are not mutually exclusive and even if there is no congressional expression of a desire to preempt state law, preemption will be found if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[6]

A final type of implied preemption is termed "field preemption"—where the scheme of federal law and regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[7]

For each of these types of preemption, the Court has said that the ultimate question is the intent behind the federal law or regulation. The problem is that the intent often is not expressed or is subject to many different plausible characterizations.

Ultimately, preemption doctrines are about allocating governing authority between the federal and state governments. A broad view of preemption leaves less room for governance by state and local governments. It is for this reason that, at times, the Court has declared that the preemption analysis "start[s] with the assumption that the historic powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[8] But a very narrow preemption doctrine minimizes the reach of federal law and risks undermining the federal objectives.

The basic question is how willing courts should be to find preemption. Should there be a strong presumption against a court concluding that there is preemption? If so, what should be sufficient to overcome this presumption? Or should courts be willing to find preemption whenever doing so would effectuate the purposes of federal law?

1. Express Preemption

Whenever Congress has the authority to legislate, Congress can make federal law exclusive in a field. The clearest way for Congress to do this is to expressly preclude state or local regulation in an area. Thus, some federal laws contain clauses that expressly preempt state and local laws. For example, the federal Employee Retirement Income Security Act of 1974 (ERISA) states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[9] The following case is illustrative of the issues that arise when courts deal with issues of express preemption.

LORILLARD TOBACCO CO. v. REILLY

533 U.S. 525 (2001)

O'Connor, J., delivered the opinion of the Court, Parts I, II-C, and II-D of which were unanimous; Parts II-A, II-B of which were joined by Rehnquist, C.J., and Scalia, Kennedy, and Thomas, JJ.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA).

I

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the regulations is "to eliminate deception and unfairness in the way tobacco products are marketed, sold and distributed in Massachusetts in order to address the

incidence of tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers."

The cigarette and smokeless tobacco regulations being challenged before this Court provide:

> (2) Retail Outlet Sales Practices. Except as otherwise provided, it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:
>
> > (c) Using self-service displays of cigarettes or smokeless tobacco products;
> >
> > (d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel.
>
> (5) Advertising Restrictions. Except as provided, it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:
>
> > (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
> >
> > (b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. The cigarette petitioners contend that the FCLAA pre-empts the Attorney General's cigarette advertising regulations.

A

In the FCLAA, Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes. The FCLAA's pre-emption provision provides:

> (a) Additional statements

> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

> (b) State regulations
>
> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

The FCLAA's pre-emption provision does not cover smokeless tobacco or cigars.

In this case, our task is to identify the domain expressly pre-empted, because "an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters." Congressional purpose is the "ultimate touchstone" of our inquiry. Because "federal law is said to bar state action in [a] fiel[d] of traditional state regulation," namely, advertising, we "wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." In the pre-emption provision, Congress unequivocally precludes the requirement of any additional statements on "cigarette packages beyond those provided in [the statute]." Congress further precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted. We must give meaning to each element of the pre-emption provision. We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted.

In 1964, the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." In 1965, Congress enacted the FCLAA as a proactive measure in the face of impending regulation by federal agencies and the States. The purpose of the FCLAA was twofold: to inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health. The FCLAA prescribed a label for cigarette packages. Section 5 of the FCLAA included a pre-emption provision in which "Congress spoke precisely and narrowly." Subsection 5(a) prohibited any requirement of additional statements on cigarette packaging. Subsection 5(b) provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

In 1969, House and Senate committees held hearings about the health effects of cigarette smoking and advertising by the cigarette industry. The bill that emerged from the House of Representatives strengthened the warning and maintained the pre-emption

provision. The Senate amended that bill, adding the ban on radio and television advertising, and changing the pre-emption language to its present form.

The final result was the Public Health Cigarette Smoking Act of 1969, in which Congress, following the Senate's amendments, made three significant changes to the FCLAA. First, Congress drafted a new label that read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Second, Congress declared it unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the FCC. Finally, Congress enacted the current pre-emption provision, which proscribes any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion" of cigarettes. The new pre-emption provision, like its predecessor, only applied to cigarettes, and not other tobacco products.

In 1984, Congress again amended the FCLAA in the Comprehensive Smoking Education Act. The purpose of the Act was to "provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." The Act established a series of warnings to appear on a rotating basis on cigarette packages and in cigarette advertising, and directed the Health and Human Services Secretary to create and implement an educational program about the health effects of cigarette smoking.

The FTC has continued to report on trade practices in the cigarette industry. In 1999, the first year since the master settlement agreement, the FTC reported that the cigarette industry expended $8.24 billion on advertising and promotions, the largest expenditure ever. Substantial increases were found in point-of-sale promotions, payments made to retailers to facilitate sales, and retail offers such as buy one, get one free, or product giveaways. Substantial decreases, however, were reported for outdoor advertising and transit advertising.

The scope and meaning of the current pre-emption provision become clearer once we consider the original pre-emption language and the amendments to the FCLAA. Without question, "the plain language of the pre-emption provision in the 1969 Act is much broader." Rather than preventing only "statements," the amended provision reaches all "requirement[s] or prohibition[s] . . . imposed under State law." And, although the former statute reached only statements "in the advertising," the current provision governs "with respect to the advertising or promotion" of cigarettes. Congress expanded the pre-emption provision with respect to the States, and at the same time, it allowed the FTC to regulate cigarette advertising. Congress also prohibited cigarette advertising in electronic media altogether. Viewed in light of the context in which the current pre-emption provision was adopted, we must determine whether the FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale advertising of cigarettes.

B

Turning first to the language in the pre-emption provision relied upon by the Court of Appeals, we reject the notion that the Attorney General's cigarette advertising regulations are not "with respect to" advertising and promotion. The Attorney General argues that the cigarette advertising regulations are not "based on smoking and health,"

because they do not involve health-related content in cigarette advertising but instead target youth exposure to cigarette advertising. To be sure, Members of this Court have debated the precise meaning of "based on smoking and health," but we cannot agree with the Attorney General's narrow construction of the phrase.

As Congress enacted the current pre-emption provision, Congress did not concern itself solely with health warnings for cigarettes. In the 1969 amendments, Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress's contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.

The context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health. Massachusetts has attempted to address the incidence of underage cigarette smoking by regulating advertising, much like Congress's ban on cigarette advertising in electronic media. At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected.

The Attorney General next claims that the State's outdoor and point-of-sale advertising regulations for cigarettes are not pre-empted because they govern the location, and not the content, of advertising. This is also Justice Stevens' main point with respect to pre-emption.

The content versus location distinction has some surface appeal. The pre-emption provision immediately follows the section of the FCLAA that prescribes warnings. The pre-emption provision itself refers to cigarettes "labeled in conformity with" the statute. But the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches all "requirements" and "prohibitions" "imposed under State law." A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere. We are not at liberty to pick and choose which provisions in the legislative scheme we will consider, but must examine the FCLAA as a whole.

Justice Stevens maintains that Congress did not intend to displace state regulation of the location of cigarette advertising. There is a critical distinction, however, between generally applicable zoning regulations, and regulations targeting cigarette advertising. The latter type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts the FCLAA. The FCLAA's comprehensive warnings, advertising restrictions, and pre-emption provision would make little sense if a State or locality could simply target and ban all cigarette advertising.

In sum, we fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of

the fact that Congress crafted a legislative solution for those very concerns. We also conclude that a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision. Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, we hold that the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA.

Justice STEVENS, with whom Justices SOUTER, GINSBURG, and BREYER join, dissenting [on the preemption issue].

As the majority acknowledges, under prevailing principles, any examination of the scope of a preemption provision must "'start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" Cipollone v. Liggett Group, Inc. (1992). As the regulations at issue in this suit implicate two powers that lie at the heart of the States' traditional police power—the power to regulate land usage and the power to protect the health and safety of minors—our precedents require that the Court construe the preemption provision "narrow[ly]." If Congress's intent to preempt a particular category of regulation is ambiguous, such regulations are not preempted.

The text of the preemption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the regulatory scheme in which it appears. An assessment of the scope of a preemption provision must give effect to a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."

This task, properly performed, leads inexorably to the conclusion that Congress did not intend to preempt state and local regulations of the location of cigarette advertising when it adopted the provision at issue in this suit. In both 1965 and 1969, Congress made clear the purposes of its regulatory endeavor, explaining with precision the federal policies motivating its actions. According to the acts, Congress adopted a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," for two reasons: (1) to inform the public that smoking may be hazardous to health and (2) to ensure that commerce and the interstate economy not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

In order to serve the second purpose it was necessary to preempt state regulation of the content of both cigarette labels and cigarette advertising. If one State required the inclusion of a particular warning on the package of cigarettes while another State demanded a different formulation, cigarette manufacturers would have been forced into the difficult and costly practice of producing different packaging for use in different States. To foreclose the waste of resources that would be entailed by such a patchwork regulatory system, Congress expressly precluded other regulators from requiring the placement on cigarette packaging of any "statement relating to smoking and health." Similar concerns applied to cigarette advertising. If different regulatory bodies required

that different warnings or statements be used when cigarette manufacturers advertised their products, the text and layout of a company's ads would have had to differ from locale to locale. The resulting costs would have come with little or no health benefit. Moreover, given the nature of publishing, it might well have been the case that cigarette companies would not have been able to advertise in national publications without violating the laws of some jurisdictions. In response to these concerns, Congress adopted a parallel provision preempting state and local regulations requiring inclusion in cigarette advertising of any "statement relating to smoking and health."

There was, however, no need to interfere with state or local zoning laws or other regulations prescribing limitations on the location of signs or billboards. Laws prohibiting a cigarette company from hanging a billboard near a school in Boston in no way conflict with laws permitting the hanging of such a billboard in other jurisdictions. Nor would such laws even impose a significant administrative burden on would-be advertisers, as the great majority of localities impose general restrictions on signage, thus requiring advertisers to examine local law before posting signs whether or not cigarette-specific laws are preempted.

The legislative history of the provision also supports such a reading. The record does not contain any evidence that Congress intended to expand the scope of preemption beyond content restrictions. To the contrary, the Senate Report makes it clear that the changes merely "clarified" the scope of the original provision. Even as amended, Congress perceived the provision as "narrowly phrased" and emphasized that its purpose is to "avoid the chaos created by a multiplicity of conflicting regulations." According to the Senate Report, the changes "in no way affect the power of any state or political subdivision of any state with respect to . . . the sale of cigarettes to minors . . . or similar police regulations."

I am firmly convinced that, when Congress amended the preemption provision in 1969, it did not intend to expand the application of the provision beyond content regulations. I, therefore, find the conclusion inescapable that the zoning regulation at issue in this suit is not a "requirement or prohibition . . . with respect to . . . advertising" within the meaning of the 1969 Act. Even if I were not so convinced, however, I would still dissent from the Court's conclusion with regard to preemption, because the provision is, at the very least, ambiguous. The historical record simply does not reflect that it was Congress's "'clear and manifest purpose,'" to preempt attempts by States to utilize their traditional zoning authority to protect the health and welfare of minors. Absent such a manifest purpose, Massachusetts and its sister States retain their traditional police powers.

Another case concerning the scope of an express preemption provision was Riegel v. Medtronic, 552 U.S. 312 (2008). The Medical Devices Amendments of 1976, 21 U.S.C. §360k, preempt states from imposing "requirements" different from federal law after the Food and Drug Administration approves a medical device. The Court held, eight to one, that this preempts state tort liability against manufacturers for devices approved by the FDA. The Court reasoned that tort liability, like regulation, changes behavior and essentially creates requirements. Justice Ginsburg was alone in dissent and stressed that there should be a presumption against preemption. She said that if Congress

wanted to preempt tort liability, it could do so, but that this law only preempted states from imposing "requirements."

More recently, in Chamber of Commerce v. Whiting, 563 U.S. 582 (2011), the Court considered a provision of federal immigration law that expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." An Arizona statute—the Legal Arizona Workers Act—provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked.[10]

The Court, in a five-to-three decision, concluded that the Arizona law was not preempted. Chief Justice Roberts, writing for the majority, explained, "Because we conclude that the State's licensing provisions fall squarely within the federal statute's savings clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted. When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.' [Federal law] expressly preempts States from imposing 'civil or criminal sanctions' on those who employ unauthorized aliens, 'other than through licensing and similar laws.' The Arizona law, on its face, purports to impose sanctions through licensing laws. The state law authorizes state courts to suspend or revoke an employer's business licenses if that employer knowingly or intentionally employs an unauthorized alien."

Justices Breyer and Sotomayor each wrote a dissenting opinion arguing that Congress had a much narrower intent and did not intend to give states the authority to revoke a corporation's ability to do business in the state.

2. Implied Preemption

a. Conflicts Preemption

If a federal and a state law are mutually exclusive, so that a person cannot comply with both, the state law is deemed preempted. This is called "conflicts preemption." The difficulty often lies in determining whether the laws actually conflict. For example, if the federal government sets a standard for air pollution control, but a state sets a stricter standard, is there conflicts preemption? It depends entirely on the intent of the federal government. If the federal government made the express decision to allow pollution above that level, then a stricter state regulation is in conflict with the federal law. But if the federal government was just setting the minimum standard, the floor of regulation, then a stricter state law is not in conflict with the federal law and would not be preempted. The following case raises exactly this issue.

FLORIDA LIME & AVOCADO GROWERS, INC. v. PAUL, DIRECTOR, DEPARTMENT OF AGRICULTURE OF CALIFORNIA

373 U.S. 132 (1963)

Justice BRENNAN delivered the opinion of the Court.

Section 792 of California's Agricultural Code, which gauges the maturity of avocados by oil content, prohibits the transportation or sale in California of avocados which contain "less than 8 per cent of oil, by weight excluding the skin and seed." In contrast, federal marketing orders approved by the Secretary of Agriculture gauge the maturity of avocados grown in Florida by standards which attribute no significance to oil content. This case presents the question of the constitutionality of the California statute insofar as it may be applied to exclude from California markets certain Florida avocados which, although certified to be mature under the federal regulations, do not uniformly meet the California requirement of 8% of oil.

We consider first appellants' challenge under the Supremacy Clause. That the California statute and the federal marketing orders embody different maturity tests is clear. However, this difference poses, rather than disposes of the problem before us.

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content. No such impossibility of dual compliance is presented on this record, however. As to those Florida avocados of the hybrid and Guatemalan varieties which were actually rejected by the California test, the District Court indicated that the Florida growers might have avoided such rejections by leaving the fruit on the trees beyond the earliest picking date permitted by the federal regulations, and nothing in the record contradicts that suggestion. Nor is there a lack of evidentiary support for the District Court's finding that the Florida varieties marketed in California "attain or exceed 8% oil content while in a prime commercial marketing condition," even though they may be "mature enough to be acceptable prior to the time that they reach that content." Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards.

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b. Preemption Because State Law Impedes the Achievement of a Federal Objective

Preemption also can be found if a state or local law is deemed to impede the achievement of a federal objective. In other words, even if the federal and state laws are not mutually exclusive, preemption will be found if the state or local law interferes with attaining a federal legislative goal. In applying this type of preemption, the courts must determine the federal objective and must decide the point at which state regulation unduly interferes with achieving the goal. The following cases illustrate this inquiry.

PACIFIC GAS & ELECTRIC CO. v. STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION

461 U.S. 190 (1983)

Justice WHITE delivered the opinion of the Court.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in American society. To facilitate this development the federal government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

This case emerges from the intersection of the federal government's efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity. At issue is whether provisions in the 1976 amendments to California's Warren-Alquist Act, which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste, are preempted by the Atomic Energy Act of 1954.

I

A nuclear reactor must be periodically refueled and the "spent fuel" removed. This spent fuel is intensely radioactive and must be carefully stored. The general practice is to store the fuel in a water-filled pool at the reactor site. For many years, it was assumed that this fuel would be reprocessed; accordingly, the storage pools were designed as short-term holding facilities with limited storage capacities. As expectations for reprocessing remained unfulfilled, the spent fuel accumulated in the storage pools, creating the risk that nuclear reactors would have to be shut down. This could occur if there were insufficient room in the pool to store spent fuel and also if there were not enough space to hold the entire fuel core when certain inspections or emergencies required unloading of the reactor. In recent years, the problem has taken on special urgency. Some 8,000 metric tons of spent nuclear fuel have already accumulated, and it is projected that by the year 2000 there will be some 72,000 metric tons of spent fuel. Government studies indicate that a number of reactors could be forced to shut down in the near future due to the inability to store spent fuel.

There is a second dimension to the problem. Even with water-pools adequate to store safely all the spent fuel produced during the working lifetime of the reactor, permanent disposal is needed because the wastes will remain radioactive for thousands of years. A number of long-term nuclear waste management strategies have been extensively examined. These range from sinking the wastes in stable deep seabeds, to placing the wastes beneath ice sheets in Greenland and Antarctica, to ejecting the wastes into space by rocket. The greatest attention has been focused on disposing of the wastes in subsurface geologic repositories such as salt deposits. Problems of how and where to store nuclear wastes has engendered considerable scientific, political, and public debate. There are both safety and economic aspects to the nuclear waste issue: first, if not properly stored, nuclear wastes might leak and endanger both the environment and human health; second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor-shutdowns, rendering nuclear energy an unpredictable and uneconomical adventure.

The California laws at issue here are responses to these concerns. Two [provisions] are before us. Section 25524.1(b) provides that before additional nuclear plants may be built, the Energy Commission must determine on a case-by-case basis that there will be "adequate capacity" for storage of a plant's spent fuel rods "at the time such nuclear facility requires such . . . storage." The law also requires that each utility provide continuous, on-site, "full core reserve storage capacity" in order to permit storage of the entire reactor core if it must be removed to permit repairs of the reactor.

Section 25524.2 deals with the long-term solution to nuclear wastes. This section imposes a moratorium on the certification of new nuclear plants until the Energy Commission "finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste." "Disposal" is defined as a "method for the permanent and terminal disposition of high-level nuclear waste. . . ." Such a finding must be reported to the state legislature, which may nullify it.

[II]

Petitioners, the United States, and supporting amici, present three major lines of argument as to why §25524.2 is preempted. First, they submit that the statute—because it regulates construction of nuclear plants and because it is allegedly predicated on safety concerns—ignores the division between federal and state authority created by the Atomic Energy Act, and falls within the field that the federal government has preserved for its own exclusive control. Second, the statute, and the judgments that underlie it, conflict with decisions concerning the nuclear waste disposal issue made by Congress and the Nuclear Regulatory Commission. Third, the California statute frustrates the federal goal of developing nuclear technology as a source of energy. We consider each of these contentions in turn.

A

Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. Instead, petitioners argue that the Act is intended to preserve the federal government as the sole regulator of all matters nuclear, and that §25524.2 falls within the scope of this impliedly preempted field. But as we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States. [This] is not particularly controversial. But deciding how §25524.2 is to be construed and classified is a more difficult proposition. At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive

authority over plant construction and operation. Respondents appear to concede as much. Respondents do broadly argue, however, that although safety regulation of nuclear plants by states is forbidden, a state may completely prohibit new construction until its safety concerns are satisfied by the federal government. We reject this line of reasoning. State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC, that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use—and would be preempted for that reason.

That being the case, it is necessary to determine whether there is a non-safety rationale for §25524.2. California has maintained, and the Court of Appeals agreed, that §25524.2 was aimed at economic problems, not radiation hazards. The California Assembly Committee on Resources, Land Use, and Energy, which proposed a package of bills including §25524.2, reported that the waste disposal problem was "largely economic or the result of poor planning, not safety related." Without a permanent means of disposal, the nuclear waste problem could become critical leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors.

B

Petitioners' second major argument concerns federal regulation aimed at the nuclear waste disposal problem itself. It is contended that §25524.2 conflicts with federal regulation of nuclear waste disposal, with the NRC's decision that it is permissible to continue to license reactors, notwithstanding uncertainty surrounding the waste disposal problem, and with Congress' recent passage of legislation directed at that problem.

Pursuant to its authority under the Act, the AEC, and later the NRC, promulgated extensive and detailed regulations concerning the operation of nuclear facilities and the handling of nuclear materials. The NRC's imprimatur, however, indicates only that it is safe to proceed with such plants, not that it is economically wise to do so. Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and §25524.2 are possible. Moreover, because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, §25524.2 does not interfere with the objective of the federal regulation.

C

Finally, it is strongly contended that §25524.2 frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power. It is well established that state law is preempted if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Hines v. Davidowitz (1941).

There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program "to

encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."

The Court of Appeals is right, however, that the promotion of nuclear power is not to be accomplished "at all costs." The elaborate licensing and safety provisions and the continued preservation of state regulation in traditional areas belie that. Moreover, Congress has allowed the States to determine—as a matter of economics — whether a nuclear plant vis-à-vis a fossil fuel plant should be built. The decision of California to exercise that authority does not, in itself, constitute a basis for preemption. Therefore, while the argument of petitioners and the United States has considerable force, the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.

In three recent cases, the Court considered implied preemption in the context of whether drug companies can be sued for the failure to warn patients of potential side effects, even though the Food and Drug Administration approved the warning labels. In Wyeth v. Levine, 555 U.S. 555 (2009), the Court held that a drug company could be sued on a failure to warn theory even though its warning label had been approved by the FDA. The Court, in a six-to-three decision, held that there is no conflict between allowing such tort liability and federal law; drug companies always can engage in more speech to warn consumers of side effects. The Court said that allowing liability would further, not undermine, the federal regulatory goal of drug safety and well-informed patients and physicians.

However, in PLIVA v. Mensing, 564 U.S. 604 (2011), the Supreme Court held that makers of generic drugs may not be sued on a failure to warn theory. Justice Thomas, writing for the majority in a five-to-four decision, concluded that the Hatch-Waxman Amendments to the Food and Drug Act allow generic drugs to be sold as long as they are the equivalent of nongeneric drugs and as long as they have the same warning label as the FDA has approved for nongeneric drugs. The Court said that this precludes makers of generic drugs from changing their labels and thus preempts state tort suits for failure to warn. Justice Sotomayor wrote for the dissenters and objected that it makes no sense to allow liability for a nongeneric drug and preempt liability for the generic version of the same product. She argued that the holding in Wyeth v. Levine should apply to both generic and nongeneric drugs.

The Court followed this in Mutual Pharmaceutical Co. v. Bartlett, 570 U.S. 472 (2013). A woman took the generic form of the pain reliever sulindac. She suffered a rare, though known side effect: two-thirds of the skin on her body burned, blistered, and decayed. She sued under state tort law claiming a design defect. But the Supreme Court, in a 5-4 decision, found the claim to be preempted. The Court said that under the Hatch-Waxman Act a generic drug can be sold if it is chemically the same as a brand name drug and if it has the warning label that was approved for the brand name drug. The Court explained that the generic drug company cannot change the drug's chemical composition and cannot change the warning label (as held in PLIVA v. Mensing) and therefore liability is

preempted. Both Justices Breyer and Sotomayor wrote dissenting opinions stressing that Congress did not mean to immunize generic drug companies from liability and that once the company chooses to sell the product, it should be liable for the harms the drug imposes.

c. Preemption Because Federal Law Occupies the Field

A final form of implied preemption is where federal law wholly occupies a field. Even though federal law does not expressly preempt state law, preemption will be found if there is a clear congressional intent to have federal law occupy a particular area of law. The most important example of this is immigration law.

Hines v. Davidowitz, 312 U.S. 52 (1941), is a classic example of preemption of state regulation in the field of immigration. A Pennsylvania law required aliens to register with the state, carry a state-issued registration card, and pay a small registration fee. The Supreme Court deemed this law preempted by emphasizing that alien registration "is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority."

The Court stressed the extensive federal regulation in the area, including a "broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported." Indeed, a federal law specifically required alien registration with the federal government.

Two aspects of *Hines* are particularly noteworthy. First, the Court found preemption of a state law that complemented the federal law; the state law in no way interfered with the federal law or its implementation. The Court said that states cannot "contradict or complement" federal immigration law.

Second, the Court found field preemption in *Hines* even in the absence of express preemptive language in the federal statute. Congress certainly could have explicitly preempted state alien registration in the federal law that required aliens to register. But Congress did not do this. The dissent in *Hines* emphasized this point.

The Court relied on *Hines* in its recent decision concerning preemption of Arizona's immigration law, SB 1070.

ARIZONA v. UNITED STATES

567 U.S. 387 (2012)

Justice KENNEDY delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S.B. 1070, the version introduced in the state senate. Its stated

purpose is to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” The law’s provisions establish an official state policy of “attrition through enforcement.” The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

I

The United States filed this suit against Arizona, seeking to enjoin S.B. 1070 as preempted. Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as §5(C). Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.” Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the Federal Government.

II

A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government’s constitutional power to “establish an uniform Rule of Naturalization,” and its inherent power as sovereign to control and conduct relations with foreign nations.

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. This Court has reaffirmed that “[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” Hines v. Davidowitz (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified which aliens may be removed from the United States and the procedures for doing so.

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an

individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border.

[III]

Section 3

Section 3 of S.B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)." In effect, §3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate.

The Court discussed federal alien-registration requirements in Hines v. Davidowitz. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." Because this "complete scheme . . . for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce additional or auxiliary regulations."

The framework enacted by Congress leads to the conclusion here, as it did in *Hines,* that the Federal Government has occupied the field of alien registration. The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

Arizona contends that §3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself— but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

As it did in *Hines,* the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." Section 3 is preempted by federal law.

Section 5(C)

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Violations can be punished by a $2,500 fine and incarceration for up to six months. The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. It also requires every employer to verify the employment authorization status of prospective employees. These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions.

This comprehensive framework does not impose federal criminal sanctions on the employee side (*i.e.*, penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead.

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives.

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Under §5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Section 5(C) is preempted by federal law.

Section 6

Section 6 of S.B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a Notice to Appear. The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. If an alien fails to appear, an *in absentia* order may direct removal.

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law.

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government.

By authorizing state officers to decide whether an alien should be detained for being removable, §6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.

Section 2(B)

Section 2(B) of S.B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." Third, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status.

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.

Some who support the challenge to §2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. Detaining individuals solely to verify their immigration status would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

The nature and timing of this case counsel caution in evaluating the validity of §2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law. As a result, the United States cannot prevail in its current challenge. This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

[IV]

Immigration policy shapes the destiny of the Nation. The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

Justice SCALIA, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

I

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.

In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so. I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: there is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area—and the so-called field preemption arising from that action, upon which the Court's opinion so heavily relies, cannot be regarded as such a prohibition. We are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the *core* of state sovereignty: the power to exclude. Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that "Congress . . . unequivocally expres[s] its intent to abrogate." Implicit "field preemption" will not do.

Nor can federal power over illegal immigration be deemed exclusive because of what the Court's opinion solicitously calls "foreign countries[‘] concern[s] about the status, safety, and security of their nationals in the United States." Even in its international relations, the

Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers.

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority. I proceed to consider the challenged provisions in detail.

§2(B)

The Government has conceded that "even before Section 2 was enacted, state and local officers had state-law authority to inquire of DHS [the Department of Homeland Security] about a suspect's unlawful status and otherwise cooperate with federal immigration officers." That concession, in my view, obviates the need for further inquiry. The Court therefore properly rejects the Government's challenge, recognizing that, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2B will be construed in a way that creates a conflict with federal law."

§6

This provision of S.B. 1070 expands the statutory list of offenses for which an Arizona police officer may make an arrest without a warrant. If an officer has probable cause to believe that an individual is "removable" by reason of a public offense, then a warrant is not required to make an arrest. The Government's primary contention is that §6 is pre-empted by federal immigration law because it allows state officials to make arrests "without regard to federal priorities."

Of course on this pre-enforcement record there is no reason to assume that Arizona officials will ignore federal immigration policy (unless it be the questionable policy of not wanting to identify illegal aliens who have committed offenses that make them removable). As Arizona points out, federal law expressly provides that state officers may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," and "cooperation" requires neither identical efforts nor prior federal approval. It is consistent with the Arizona statute, and with the "cooperat[ive]" system that Congress has created, for state officials to arrest a removable alien, contact federal immigration authorities, and follow their lead on what to do next. And it is an assault on logic to say that identifying a removable alien and holding him for federal determination of whether he should be removed "violates the principle that the removal process is entrusted to the discretion of the Federal Government." The State's detention does not represent commencement of the removal process unless the Federal Government makes it so.

But that is not the most important point. The most important point is that, as we have discussed, Arizona is *entitled* to have "its own immigration -policy"—including a more rigorous enforcement policy—so long as that does not conflict with federal law.

§3

It is beyond question that a State may make violation of federal law a violation of state law as well. We have held that to be so even when the interest protected is a distinctively federal interest, such as protection of the dignity of the national flag, or protection of the Federal Government's ability to recruit soldiers. The Court points out, however, that in some respects the state law exceeds the punishments prescribed by federal law: It rules out probation and pardon, which are available under federal law. The answer is that it makes no difference. Illegal immigrants who violate §3 violate *Arizona* law. It is one thing to say that the Supremacy Clause prevents Arizona law from excluding those whom federal law admits. It is quite something else to say that a violation of Arizona law cannot be punished more severely than a violation of federal law. Especially where (as here) the State is defending its own sovereign interests, there is no precedent for such a limitation. The sale of illegal drugs, for example, ordinarily violates state law as well as federal law, and no one thinks that the state penalties cannot exceed the federal. As I have discussed, moreover, "field preemption" cannot establish a prohibition of additional state penalties in the area of immigration.

§5(C)

The Court concludes that §5(C) "would interfere with the careful balance struck by Congress," (another field pre-emption notion, by the way) but that is easy to say and impossible to demonstrate. The Court relies primarily on the fact that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting [the Immigration Reform and Control Act of 1986 (IRCA)]," "[b]ut Congress rejected them." There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States. To tell the truth, it was most likely expressive of what inaction ordinarily expresses: nothing at all. It is a "naïve assumption that the failure of a bill to make it out of committee, or to be adopted when reported to the floor, is the same as a congressional rejection of what the bill contained."

[II]

The brief for the Government in this case asserted that "the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely." Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift. Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive's unwise targeting of that funding?

Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws? A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Today's judgment surely fails that test.

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to

remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona's estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.

Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

B. THE DORMANT COMMERCE CLAUSE

The "dormant Commerce Clause" is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. There is no constitutional provision that expressly declares that states may not burden interstate commerce. Rather, the Supreme Court has inferred this from the grant of power to Congress in Article I, §8 to regulate commerce among the states.

If Congress has legislated, the issue is whether the federal law preempts the state or local law—the issue discussed above. But even if Congress has not acted or no preemption is found, the state or local law can be challenged on the ground that it excessively burdens commerce among the states. In other words, even if Congress has not acted—even if its commerce power lies dormant, state and local laws still can be challenged as unduly impeding interstate commerce. As Felix Frankfurter explained, "[T]he doctrine [is] that the Commerce Clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority."[11]

The Commerce Clause thus has two distinct functions. One is an authorization for congressional actions. The scope of Congress's power to legislate under the Commerce Clause is discussed in Chapter 2. The other function of the Commerce Clause is in limiting state and local regulation. This is the dormant or "negative" Commerce Clause.

The dormant Commerce Clause is not the only way of challenging state laws that burden interstate commerce, especially if the state or local law discriminates against out-of-staters. For example, if the state or local government discriminates against out-of-staters with regard to a fundamental right or important economic activities, a challenge can be brought under the Privileges and Immunities Clause of Article IV, §2. The Privileges and Immunities Clause is discussed in the next subsection. Also, laws that discriminate against out-of-staters can be challenged under the Equal Protection Clause of the Fourteenth Amendment.

The discussion of the dormant Commerce Clause begins in subsection 1 of this section by examining whether there should be a dormant Commerce Clause. Understanding the policies underlying the dormant Commerce Clause is important in considering the cases that follow. Also, there is a debate among justices and scholars as to whether there

should be a dormant Commerce Clause and under what circumstances courts should use it.

Subsection 2 then describes the history of the Court's dormant Commerce Clause cases.

Subsection 3 presents the key cases concerning the contemporary dormant Commerce Clause. The central question in dormant Commerce Clause analysis is whether the state or local law discriminates against out-of-staters or whether it treats in-staters and out-of-staters alike. If a law is found to discriminate, it is very likely to be declared unconstitutional. If a law is deemed nondiscriminatory, the law is likely to be upheld. Therefore, subsection 3 proceeds in three steps: First, how is it determined whether a law is discriminatory? Second, what is the analysis for laws that are discriminatory? And finally, what is the analysis for laws that are not discriminatory?

Subsection 4 then considers exceptions to the dormant Commerce Clause—that is, situations in which laws that otherwise would violate the dormant Commerce Clause will be allowed. One exception is if Congress approves the state or local action. Congress has plenary power to regulate commerce among the states and may authorize laws that otherwise would violate the dormant Commerce Clause. The other major exception is termed "the market participant exception." Under the market participant exception, a state or local government may favor its own citizens in receiving benefits from state or local governments or in dealing with government-owned businesses.

1. Why a Dormant Commerce Clause?

Congress always has the authority under its commerce power to preempt state or local regulation of commerce. Therefore, Congress could invalidate any state or local law that it deems to place an undue burden on interstate commerce. The crucial issue with regard to the dormant Commerce Clause is whether the judiciary, in the absence of congressional action, should invalidate state and local laws because they place an undue burden on interstate commerce.

In H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949), Justice Jackson, writing for the Court, explains the justifications for the dormant Commerce Clause:

> This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.
>
> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. "[E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union." Story, The Constitution. The sole purpose for which Virginia initiated the movement which ultimately

produced the Constitution was "to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony" and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished.

The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate. But the significance of the clause was not lost and its effect was immediate and salutary.

The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

A recent case reiterates the justifications for the dormant commerce clause.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION v. THOMAS

139 S. Ct. 2449 (2019)

Justice ALITO delivered the opinion of the Court.

The State of Tennessee imposes demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license to operate a liquor store. One provision precludes the renewal of a license unless the applicant has resided in the State for 10 consecutive years. Another provides that a corporation cannot obtain a license unless all of its stockholders are residents. The Court of Appeals for the Sixth Circuit struck down these provisions as blatant violations of the Commerce Clause, and neither petitioner—an association of Tennessee liquor retailers—nor the State itself defends them in this Court.

The Sixth Circuit also invalidated a provision requiring applicants for an initial license to have resided in the State for the prior two years, and petitioner does challenge that decision. But while this requirement is less extreme than the others that the Sixth Circuit found to be unconstitutional, we now hold that it also violates the Commerce Clause and is not shielded by §2 of the Twenty-first Amendment. Section 2 was adopted as part of the scheme that ended prohibition on the national level. It gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable. But §2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.

I

No person may lawfully participate in the sale of alcohol [in Tennessee] without the appropriate license. Included in the Tennessee scheme are onerous durational-residency requirements for all persons and companies wishing to operate "retail package stores" that sell alcoholic beverages for off-premises consumption (hereinafter liquor stores). To obtain an initial retail license, an individual must demonstrate that he or she has "been a bona fide resident" of the State for the previous two years.

II

A

The Court of Appeals held that Tennessee's 2-year residency requirement violates the Commerce Clause, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.

This interpretation, generally known as "the dormant Commerce Clause," has a long and complicated history. Its roots go back as far as Gibbons v. Ogden (1824), where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had "great force."

In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the

dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.

That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very life-blood of the nation." The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In The Federalist No. 7, Hamilton argued that state protectionism could lead to conflict among the States, and in No. 11, he touted the benefits of a free national market. In The Federalist No. 42, Madison sounded a similar theme.

In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job. The only other provisions that the Framers might have thought would fill that role, at least in part, are the Import-Export Clause, Art. I, §10, cl. 2, which generally prohibits a State from "lay[ing] any Imposts or Duties on Imports or Exports," and the Privileges and Immunities Clause, Art. IV, §2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." But the Import-Export Clause was long ago held to refer only to international trade. And the Privileges and Immunities Clause has been interpreted not to protect corporations, and may not guard against certain discrimination scrutinized under the dormant Commerce Clause. So if we accept the Court's established interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism.

It is not surprising, then, that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence. [W]e observed that our dormant Commerce Clause cases reflect a "'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.

B

Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to "'advanc[e] a legitimate local purpose.'" Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a commodity other than alcohol. Instead, their arguments are based on §2 of the Twenty-first Amendment, to which we will now turn.

III

Section 2 of the Twenty-first Amendment provides as follows:

> "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."

Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading §2 to prohibit the transportation or importation of alcoholic beverages in violation of *any* state law would lead to absurd results that the provision cannot have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, such a reading of §2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause. Similarly, if a state law prohibited the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue, the First Amendment would provide no protection. If a State imposed a duty on the importation of foreign wine or spirits, the Import-Export Clause would have to give way. If a state law retroactively made it a crime to have bought or sold imported alcohol under specified conditions, the *Ex Post Facto* Clause would provide no barrier to conviction. The list goes on.

Despite the ostensibly broad text of §2, no one now contends that the provision must be interpreted in this way. Instead, we have held that §2 must be viewed as one part of a unified constitutional scheme. In attempting to understand how §2 and other constitutional provisions work together, we have looked to history for guidance, and history has taught us that the thrust of §2 is to "constitutionaliz[e]" the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment.

IV

By 1933, support for Prohibition had substantially diminished but not vanished completely. Thirty-eight state conventions eventually ratified the Twenty-first Amendment, but 10 States either rejected or took no action on the Amendment. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment and thus ended nationwide Prohibition, but §2, the provision at issue here, gave each State the option of banning alcohol if its citizens so chose. Accordingly, we have inferred that §2 was meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition.

This understanding is supported by the debates on the Amendment in Congress and the state ratifying conventions. The records of the state conventions provide no evidence that §2 was understood to give States the power to enact protectionist laws, "a privilege [the States] had not enjoyed at any earlier time."

Applying that principle, we have invalidated state alcohol laws aimed at giving a competitive advantage to in-state businesses. Most recently, in Granholm [v. Heald (2005)], we struck down a set of discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors. After surveying the history of §2, we affirmed that "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." We therefore examined whether the challenged laws were reasonably necessary to protect the States' asserted interests in policing underage drinking and facilitating tax collection. Concluding that the answer to that question was no, we invalidated the laws as inconsistent with the dormant Commerce Clause's nondiscrimination principle.

To summarize, the Court has acknowledged that §2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read §2 as allowing the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize.

V

Having concluded that §2 does not confer limitless authority to regulate the alcohol trade, we now apply the §2 analysis dictated by the provision's history and our precedents.

If we viewed Tennessee's durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist. Indeed, two of those requirements—the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded corporations—are so plainly based on unalloyed protectionism that neither the Association nor the State is willing to come to their defense. The provision that the Association and the State seek to preserve—the 2-year residency requirement for initial license applicants—forms part of that scheme. But we assume that it can be severed from its companion provisions, and we therefore analyze that provision on its own.

Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State. But because of §2, we engage in a different inquiry. Recognizing that §2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by §2.

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. [T]he record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.

Given all this, the Association has fallen far short of showing that the 2-year durational-residency requirement for license applicants is valid. Like the other discriminatory residency requirements that the Association is unwilling to defend, the predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition. We therefore hold that this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment.

Justice GORSUCH with whom Justice THOMAS joins, dissenting.

Alcohol occupies a complicated place in this country's history. Some of the founders were enthusiasts; Benjamin Franklin thought wine was "proof that God loves us." Many in the Prohibition era were decidedly less enamored; they saw "liquor [a]s a lawlessness unto itself." Over time, the people have adopted two separate constitutional Amendments to adjust and then readjust alcohol's role in our society. But through it all, one thing has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms. In fact, States have enacted residency requirements for at least 150 years, and the Tennessee law at issue before us has stood since 1939. Today and for the first time, the Court claims to have discovered a duty and power to strike down laws like these as unconstitutional. Respectfully, I do not see it.

Start with the text of the Constitution. After the Nation's failed experiment with Prohibition, the people assembled in conventions in each State to adopt the Twenty-first Amendment. In §1, they repealed the Eighteenth Amendment's nationwide prohibition on the sale of alcohol. But in §2, they provided that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Amendment thus embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences. And under the terms of this compromise, Tennessee's law imposing a two-year residency requirement on those who seek to sell liquor within its jurisdiction would seem perfectly permissible.

Of course, §2 does not immunize state laws from *all* constitutional claims. Everyone agrees that state laws must still comply with, say, the First Amendment or the Equal Protection Clause. But the challenge before us isn't based on any constitutional provision like that. Instead, we are asked to decide whether Tennessee's residency requirement impermissibly discriminates against out-of-state residents and recent arrivals in violation of the "dormant Commerce Clause" doctrine. And that doctrine is a peculiar one. Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one. Under its banner, this Court has sometimes asserted the power to strike down state laws that discriminate against nonresidents on the ground that they usurp the authority to regulate interstate commerce that the Constitution assigns in Article I to Congress. But precisely because the Constitution assigns *Congress* the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents.

And that's exactly what happened here. In the Webb-Kenyon Act of 1913, Congress gave the States wide latitude to restrict the sale of alcohol within their borders. Not only

is that law still on the books today, §2 of the Twenty-first Amendment closely "followed the wording of the 1913 Webb-Kenyon Act." Accordingly, the people who adopted the Amendment naturally would have understood it to constitutionalize an "exception to the normal operation of the [dormant] Commerce Clause." After all, what Congress can do by statute "surely the people may do . . . through the process of amending our Constitution." So in this area, at least, we should not be in the business of imposing our own judge-made "dormant Commerce Clause" limitations on state powers.

What the relevant constitutional and statutory texts suggest, history confirms. Licensing requirements for the sale of liquor are older than the Nation itself.

As judges, we may be sorely tempted to "rationalize" the law and impose our own free-trade rules for all goods and services in interstate commerce. Certainly, that temptation seems to have proven nearly irresistible for this Court when it comes to alcohol. But real life is not always so tidy and satisfactory, and neither are the democratic compromises we are bound to respect as judges. Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for "cabbages and candlesticks" should not be applied to alcohol. Under the terms of the compromise they hammered out, the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D. C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as "laborator[ies]" of democracy, with "broad power to regulate liquor under §2." If the people wish to alter this arrangement, that is their sovereign right. But until then, I would enforce the Twenty-first Amendment as they wrote and originally understood it.

The Court presents the traditional arguments for having a dormant Commerce Clause. First, there is a historical argument for the dormant Commerce Clause: The framers intended to prevent state laws that interfered with interstate commerce. Second, there is an economic justification for the dormant Commerce Cause: The economy is better off if state and local laws impeding interstate commerce are invalidated. Third, there is a political justification for the dormant Commerce Clause: States and their citizens should not be harmed by laws in other states where they lack political representation. In McCulloch v. Maryland, the Supreme Court invalidated Maryland's tax on the Bank of the United States, in part, because it was a tax that ultimately would be borne by those in other states that obviously did not have representation in the Maryland political process.[12] Similarly, the political process cannot be trusted when a state is helping itself at the expense of out-of-staters who have no representation. Justice Stone explained: "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[13]

But others, as Justice Alito alluded to, argue against the existence of a dormant Commerce Clause. The strongest recent criticism of the existence of the dormant Commerce Clause has been by Justice Clarence Thomas. For example, in a dissenting opinion in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

The majority of the Supreme Court declared unconstitutional on dormant Commerce Clause grounds a state property tax because its exemption for property owned by charitable institutions excluded organizations operated principally for the benefit of nonresidents.

Justice Thomas dissented and strongly criticized the dormant Commerce Clause, especially in instances where the state does not discriminate against out-of-staters. Thomas wrote:

> The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. In one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized these problems, if not been troubled by them.
>
> To cover its exercise of judicial power in an area for which there is no textual basis, the Court has historically offered two different theories in support of its negative Commerce Clause jurisprudence. The first theory posited was that the Commerce Clause itself constituted an exclusive grant of power to Congress. See, e.g., Passenger Cases (1849). The "exclusivity" rationale was likely wrong from the outset, however. And, in any event, the Court has long since "repudiated" the notion that the Commerce Clause operates as an exclusive grant of power to Congress, and thereby forecloses state action respecting interstate commerce. Freeman v. Hewit (1946) (Rutledge, J., concurring). Indeed, the Court's early view that the Commerce Clause, on its own, prohibited state impediments to interstate commerce such that "Congress cannot re-grant, or in any manner reconvey to the states that power," Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots (185[1]), quickly proved untenable. And, as this Court's definition of the scope of congressional authority under the positive Commerce Clause has expanded, the exclusivity rationale has moved from untenable to absurd.
>
> The second theory offered to justify creation of a negative Commerce Clause is that Congress, by its silence, pre-empts state legislation. See Robbins v. Shelby County Taxing Dist. (1887) (asserting that congressional silence evidences congressional intent that there be no state regulation of commerce). In other words, we presumed that congressional "inaction" was "equivalent to a declaration that inter-State commerce shall be free and untrammelled." Welton v. Missouri (1876). To the extent that the "pre-emption-by-silence" rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of the law.
>
> Even were we wrongly to assume that congressional silence evidenced a desire to pre-empt some undefined category of state laws, and an intent to delegate such policy-laden categorization to the courts, treating unenacted congressional intent as if it were law would be constitutionally dubious.

> In sum, neither of the Court's proffered theoretical justifications—exclusivity or pre-emption-by-silence—currently supports our negative Commerce Clause jurisprudence, if either ever did. Despite the collapse of its theoretical foundation, I suspect we have nonetheless adhered to the negative Commerce Clause because we believed it necessary to check state measures contrary to the perceived spirit, if not the actual letter, of the Constitution.
>
> Moreover, our negative Commerce Clause jurisprudence has taken us well beyond the invalidation of obviously discriminatory taxes on interstate commerce. We have used the Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make. Any test that requires us to assess (1) whether a particular statute serves a "legitimate" local public interest; (2) whether the effects of the statute on interstate commerce are merely "incidental" or "clearly excessive in relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce, and even then makes the question "one of degree," surely invites us, if not compels us, to function more as legislators than as judges. Moreover, our open-ended balancing tests in this area have allowed us to reach different results based merely "on differing assessments of the force of competing analogies."
>
> In my view, none of this policy-laden decisionmaking is proper. Rather, the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce described above, and leaves to Congress the policy choices necessary for any further regulation of interstate commerce.

The argument against the dormant Commerce Clause is, in part, textual. The drafters of the Constitution could have included a provision prohibiting states from interfering with interstate commerce. Also, opponents of the dormant Commerce Clause argue that the Constitution gives Congress the power to regulate commerce and Congress can act to invalidate state laws that unduly burden interstate commerce. The argument is that this should not be a task for an unelected federal judiciary. Thus, this is an argument based partially on separation of powers (the task of reviewing state laws should be done by Congress and not by the courts) and partially on federalism (minimizing the instances where state and local laws are invalidated).

In reading the cases that follow, consider these competing policy considerations, whether there should be a dormant Commerce Clause, and especially when it should apply.

2. The History of the Dormant Commerce Clause

The dormant Commerce Clause can be traced back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The issue in *Gibbons* was whether the state of New York could grant an exclusive monopoly for operating steamboats in New York waters and thereby prevent a person with a federal license from operating in New York. As presented in

Chapter 2, Chief Justice John Marshall, writing for the Court, used *Gibbons* as the occasion for broadly defining the scope of Congress's power under the Commerce Clause. Marshall said that "commerce" refers to all stages of business and that "among the states" includes matters that affect more than one state and are not purely internal. Chief Justice John Marshall also used *Gibbons* for considering the Commerce Clause as an independent limit on state power, even where Congress has not acted. Marshall explained that "when a State proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." This argument would seem to imply that Congress's commerce power is exclusive; that any state regulation of commerce is inconsistent with federal power. The idea appears to be that the power to regulate commerce is the authority to decide that commerce should not be regulated and that states therefore should not be able to act with regard to commerce unless specifically authorized by Congress.

Chief Justice Marshall, however, did not go nearly this far in limiting state authority. Rather, Marshall drew a distinction between a state's exercise of its police power and a state exercising the federal power over commerce. Marshall said, for example, that state inspection laws are constitutional even though they may have a "considerable influence on commerce" because they are a "portion of that great immense of legislation, which embraces every thing within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

The Court has struggled ever since *Gibbons* with attempting to articulate criteria for when state laws burdening commerce should be upheld as valid exercises of the police power and when they should be invalidated as violating the dormant Commerce Clause. Cooley v. Board of Wardens is a particularly important case in which the Court drew a distinction between subject matter that is national, in which case state laws are invalidated under the dormant Commerce Clause, and subject matter that is local, in which case state laws are allowed.

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AARON B. COOLEY v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA EX REL. SOCIETY FOR RELIEF OF DISTRESSED PILOTS

53 U.S. (12 How.) 299 (1851)

[A Pennsylvania law required all ships entering or leaving the Port of Philadelphia to use a local pilot or pay a fine that went to support retired pilots.]

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions.

[We] cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one. It is urged that the second section of the act of the Legislature of Pennsylvania, of the 11th of June, 1832, proves that the state had other objects in view than the regulation of pilotage.

It must be remembered, that the fair objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, not to those bound to, or sailing from, a port in the river Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade, and the tonnage of vessels engaged therein.

We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving from the charge of half-pilotage, such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services.

The Act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject is such that it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system or plan for regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the parts within their limits.

Many cases applied the *Cooley* test throughout the nineteenth century and into the twentieth century. In Welton v. Missouri, 91 U.S. (1 Otto) 275 (1875), the Court used the *Cooley* approach to invalidate a law that required peddlers of out-of-state merchandise to pay a tax and obtain a license, whereas no similar requirements existed for in-state merchants. The Court said that “transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation.” Similarly, in Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557 (1886), the Court used the *Cooley* approach to invalidate a state law that regulated railway rates for goods brought to or from other states. The Court emphasized that there would be enormous burdens on interstate commerce if all states adopted such laws and thus concluded that it was an area that required national uniformity and not local regulation.

But during this same time the Court upheld other state laws on the ground that they were in areas where diverse regulation was desirable. For instance, in Smith v. Alabama, 124 U.S. 465 (1888), the Court upheld a state law requiring that all locomotive engineers operating in the state be licensed by a state board of examiners. Likewise, in Erb v. Morasch, 177 U.S. 584 (1900), the Court upheld a city's ordinance that restricted train speed within the city. In Atchison Topeka & Santa Fe Ry. Co. v. Railroad Commn., 283 U.S. 380 (1931), the Court upheld a state law that required electric headlights of prescribed brightness on all trains operating within the state.

The nineteenth century's approaches summarized above—the police power/commerce power test of *Gibbons* and the local/national subject matter test of *Cooley* — attempted to draw rigid categories of areas where federal law was exclusive and those where states could regulate. The modern approach is based not on rigid categories, but rather on courts balancing the benefits of a law against the burdens that it imposes on interstate commerce. It should be noted, however, that the Court never has expressly overruled any of the earlier tests and sometimes invokes them in explaining a particular result.

The Court's shift to a balancing approach in dormant commerce clause analysis is evident from comparing two cases, South Carolina State Highway Dept. v. Barnwell Bros., 330 U.S. 177 (1938) and Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). In *Barnwell*, the Court upheld a state law that imposed length and width requirements for trucks operating in the state. The Court emphasized the state's important interest in protecting highway safety and in preserving its roadways. In contrast, in *Southern Pacific*, the Court declared unconstitutional a state law that limited the length of railroad trains operating in the state. The Court in *Southern Pacific* expressly articulated a balancing test when it said: "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and nation(al interests involved are such [as to make the law permissible]." The difference is that in *Barnwell*, the Court believed that the burdens on interstate commerce were outweighed by the benefits in terms of road safety; whereas in *Southern Pacific*, the Court decided that the burdens on interstate transportation were greater than the safety benefit to the state from its law.

In other words, the central issue in dormant commerce clause cases is whether the benefits of the state law outweigh its burdens on interstate commerce. By definition, such a balancing test gives courts enormous discretion because it is attempting to weigh and compare two completely different things: burdens on interstate commerce and the benefits to a state or local government.

In recent years, some justices, most notably Rehnquist, Scalia, and Thomas, have objected to this balancing test and have argued in favor of upholding all state laws that are deemed nondiscriminatory. Justice Scalia contended, "This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. . . . Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, and ill suited to the judicial function."[14] As quoted above,

Justice Thomas also has been very critical of the balancing test in dormant Commerce Clause cases, and of the existence of the dormant commerce clause more generally.[15]

The question, of course, is what should replace the balancing test. The categorical approaches that preceded it were not useful in deciding whether a particular law violated the dormant Commerce Clause. Justice Scalia's answer is to eliminate dormant Commerce Clause review where the state is not discriminating against out-of-staters. Scalia wrote, "I would therefore abandon the balancing approach to these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress. . . . In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose."[16]

The question that Justices Scalia and Thomas raise is whether there should be any dormant Commerce Clause review when a state law is deemed nondiscriminatory.

On the one hand, assuring a free flow of commerce among the states is best achieved by eliminating burdens on interstate commerce. On the other hand, there is no reason to distrust the political process when it is treating in-staters and out-of-staters alike. Limiting the scope of the dormant Commerce Clause has the benefits of minimizing the judicial role and maximizing the deference paid to state and local governments.

3. Analyzing Whether a Law Violates the Dormant Commerce Clause

a. Determining Whether a Law Is Discriminatory

The balancing prescribed by the Supreme Court is not the same in all dormant Commerce Clause cases, but instead varies depending upon whether the state or local law discriminates against out-of-staters or treats in-staters and out-of-staters alike. As discussed below, if the Court concludes that a state is discriminating against out-of-staters, then there is a strong presumption against the law and it will be upheld only if it is necessary to achieve an important purpose. In contrast, if the Court concludes that the law is nondiscriminatory, then the presumption is in favor of upholding the law, and it will be invalidated only if it is shown that the law's burdens on interstate commerce outweigh its benefits.

Thus, the threshold question is determining whether the state law is discriminatory against out-of-staters. This makes sense in light of the purposes of the dormant Commerce Clause. The framers were most concerned about stopping protectionist state legislation, where a state would discriminate against out-of-staters to benefit its citizens at the expense of out-of-staters. Also, it is thought that protectionist laws are most likely to interfere with the economy. Besides, if a law applies to in-staters and out-of-staters equally, then at least some of those affected by the law are represented in the political process.

Sometimes laws are facially discriminatory against out-of-staters; that is, the laws in their very terms draw a distinction between in-staters and out-of-staters. Other times, laws are facially neutral, but might be motivated by a desire to help in-staters at the expense of

out-of-staters or might have a discriminatory impact against those from other states. The first set of cases presented below involves facial discrimination; then presented are cases involving claims of facially neutral laws with discriminatory purpose or impact. After these cases, the next subsection looks at the analysis used when a law is deemed discriminatory; following this is a subsection examining the analysis for when a law is deemed not discriminatory.

FACIALLY DISCRIMINATORY LAWS

Sometimes, a law clearly favors in-staters over out-of-staters. For example, in Granholm v. Heald, 544 U.S. 460 (2005), the Court struck down state laws that allowed in-state wineries, but not out-of-state wineries, to sell wine directly to consumers through the mail. In recent years, many of the cases before the Supreme Court involving the dormant Commerce Clause have involved challenges to state and local environmental regulations. Below are three important Supreme Court decisions considering local laws designed to deal with solid-waste disposal problems.

CITY OF PHILADELPHIA v. NEW JERSEY

437 U.S. 617 (1978)

Justice STEWART delivered the opinion of the Court.

A New Jersey law prohibits the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." In this case we are required to decide whether this statutory prohibition violates the Commerce Clause of the United States Constitution.

I

The statutory provision in question is ch. 363 of 1973 N.J. Laws, which took effect in early 1974. In pertinent part it provides: "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

Immediately affected by these developments were the operators of private landfills in New Jersey, and several cities in other States that had agreements with these operators for waste disposal. They brought suit against New Jersey and its Department of Environmental Protection in state court, attacking the statute and regulations on a number of state and federal grounds.

All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. Hence, we reject the state court's suggestion that the banning of "valueless" out-of-state wastes by ch. 363 implicates no constitutional protection. Just as

Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement.

[II]

Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity." South Carolina State Highway Dept. v. Barnwell Bros., Inc. (1939). In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself.

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.

The crucial inquiry, therefore, must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

The purpose of ch. 363 is set out in the statute itself as follows: "The Legislature finds and determines that . . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited."

[I]t does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, or to create jobs by keeping industry within the State, or to preserve the State's financial resources from depletion by fencing out indigent immigrants. In each of these cases, a presumably legitimate goal

was sought to be achieved by the illegitimate means of isolating the State from the national economy.

The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution. Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

A growing problem in our Nation is the sanitary treatment and disposal of solid waste. For many years, solid waste was incinerated. Because of the significant environmental problems attendant on incineration, however, this method of solid waste disposal has declined in use in many localities, including New Jersey. "Sanitary" landfills have replaced incineration as the principal method of disposing of solid waste. In ch. 363 of the 1973 N.J. Laws, the State of New Jersey legislatively recognized the unfortunate fact that landfills also present extremely serious health and safety problems. First, in New Jersey, "virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes . . . ground and surface waters." The natural decomposition process which occurs in landfills also produces large quantities of methane and thereby presents a significant explosion hazard. Landfills can also generate "health hazards caused by rodents, fires and scavenger birds" and, "needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems."

The health and safety hazards associated with landfills present appellees with a currently unsolvable dilemma. Other, hopefully safer, methods of disposing of solid wastes are still in the development stage and cannot presently be used. But appellees obviously cannot completely stop the tide of solid waste that its citizens will produce in the interim. For the moment, therefore, appellees must continue to use sanitary landfills to dispose of New Jersey's own solid waste despite the critical environmental problems thereby created.

The question presented in this case is whether New Jersey must also continue to receive and dispose of solid waste from neighboring States, even though these will inexorably increase the health problems discussed above. The Court answers this question in the affirmative. New Jersey must either prohibit all landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems

which would result if it dealt only with such wastes generated within the State. Because past precedents establish that the Commerce Clause does not present appellees with such a Hobson's choice, I dissent.

Many cases involving facially discriminatory laws have dealt with attempts by state and local governments to conserve their natural resources for use by their own residents. The following case is illustrative of such a state law that facially discriminates in this way.

The Court has held that reciprocity requirements—a state allows out-of-staters to have access to markets or resources only when the out-of-staters are from states that grant similar benefits—are facially discriminatory. For instance, in Great A&P Tea Co. v. Cottrell, 424 U.S. 366 (1976), the Court unanimously invalidated a Mississippi law that provided that milk could be shipped into Mississippi from another state only if it had a public health certificate and only if the other state would accept milk from Mississippi on a reciprocal basis. Likewise, in Sporhase v. Nebraska, 458 U.S. 941 (1982), the Court found that a state law was discriminatory when it denied a permit to draw and use water for use in another state unless that state granted reciprocal rights to draw water for use in Nebraska.

FACIALLY NEUTRAL LAWS

The Supreme Court has held that facially neutral laws can be found to be discriminatory if they either have the purpose or the effect of discriminating against out-of-staters. The Court has declared: "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect or of discriminatory purpose." Minnesota v. Clover Leaf Creamery Co., 450 U.S. 1027 (1981). This is very different from analysis under the Equal Protection Clause, discussed in Chapter 7, where a facially neutral law is deemed discriminatory only if there is both a discriminatory purpose and a discriminatory effect.

The difficulty for courts is in deciding whether a particular law has a discriminatory purpose or a legitimate nondiscriminatory objective and whether a law should be deemed to have a discriminatory impact. This difficulty is illustrated by comparing the following cases. In the first case presented, Hunt v. Washington State Apple Advertising Commn., the Court found that discriminatory impact is sufficient for a law to be deemed discriminatory and concluded that the state's statute was impermissibly discriminatory in its effects. In the second case, Exxon Corp. v. Governor of Maryland, the Court found that the law was not discriminatory and upheld its constitutionality. As you read these cases, compare their discriminatory effects and consider whether there is a meaningful difference in this regard between the decisions.

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HUNT, GOVERNOR OF THE STATE OF NORTH CAROLINA v. WASHINGTON STATE APPLE ADVERTISING COMMISSION

432 U.S. 333 (1977)

Chief Justice BURGER delivered the opinion of the Court.

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a significant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $1 million each year.

In 1973, North Carolina enacted a statute which required all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard." State grades were expressly prohibited. In addition to its obvious consequence prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed containers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety and grade. It is the industry's practice to purchase these containers preprinted with the various apple varieties and grades, prior to harvest. After these containers are filled with apples of the appropriate type and grade, a substantial portion of them are placed in cold-storage warehouses where the grade labels identify the product and facilitate its handling. These apples are then shipped as needed throughout the year; after February 1 of each year, they constitute approximately two-thirds of all apples sold in fresh markets in this country. Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from

the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-à-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. Dean Milk Co. v. Madison (1951). North Carolina has failed to sustain that burden on both scores. The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate.

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In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could

effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades.

EXXON CORP. v. GOVERNOR OF MARYLAND

437 U.S. 117 (1978)

Justice STEVENS delivered the opinion of the Court.

A Maryland statute provides that a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all "voluntary allowances" uniformly to all service stations it supplies.

The Maryland statute is an outgrowth of the 1973 shortage of petroleum. In response to complaints about inequitable distribution of gasoline among retail stations, the Governor of Maryland directed the State Comptroller to conduct a market survey. The results of that survey indicated that gasoline stations operated by producers or refiners had received preferential treatment during the period of short supply. The Comptroller therefore proposed legislation which was "designed to correct the inequities in the distribution and pricing of gasoline reflected by the survey."

The essential facts alleged in the complaint are not in dispute. All of the gasoline sold by Exxon in Maryland is transported into the State from refineries located elsewhere. Although Exxon sells the bulk of this gas to wholesalers and independent retailers, it also sells directly to the consuming public through 36 company-operated stations. Exxon uses these stations to test innovative marketing concepts or products. Focusing primarily on the Act's requirement that it discontinue its operation of these 36 retail stations, Exxon's complaint challenged the validity of the statute.

Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless. Appellants, however, focus on the retail market arguing that the effect of the statute is to protect in-state independent dealers from out-of-state competition. They contend that the divestiture provisions "create a protected enclave for Maryland independent dealers. . . ." As support for this proposition, they rely on the fact that the burden of the divestiture requirements falls solely on interstate companies. But this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level.

As the record shows, there are several major interstate marketers of petroleum that own and operate their own retail gasoline stations. These interstate dealers, who compete directly with the Maryland independent dealers, are not affected by the Act because they do not refine or produce gasoline. In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place

added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce. See, e.g., Hunt v. Washington Apple Advertising Commn. For instance, the Court in *Hunt* noted that the challenged state statute raised the cost of doing business for out-of-state dealers, and, in various other ways, favored the in-state dealer in the local market. No comparable claim can be made here. While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Appellants argue, however, that this fact does show that the Maryland statute impermissibly burdens interstate commerce. They point to evidence in the record which indicates that, because of the divestiture requirements, at least three refiners will stop selling in Maryland, and which also supports their claim that the elimination of company-operated stations will deprive the consumer of certain special services. Even if we assume the truth of both assertions, neither warrants a finding that the statute impermissibly burdens interstate commerce. Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

Appellants claim that the statute "will surely change the market structure by weakening the independent refiners. . . ." We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden *on* commerce.

Justice BLACKMUN, dissenting.

I dissent from the Court's opinion because it fails to condemn impermissible discrimination against interstate commerce in *retail* gasoline marketing. The divestiture provisions preclude out-of-state competitors from retailing gasoline within Maryland. The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more even-handed regulation. [The law,] therefore, violate[s] the Commerce Clause.

In Maryland the retail marketing of gasoline is interstate commerce, for all petroleum products come from outside the State. Retailers serve interstate travelers. To the extent that particular retailers succeed or fail in their businesses, the interstate wholesale market for petroleum products is affected.

The Commerce Clause forbids discrimination against interstate commerce, which repeatedly has been held to mean that States and localities may not discriminate against the transactions of out-of-state actors in interstate markets. The discrimination need not appear on the face of the state or local regulation. "The Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." The state or local authority need not intend to discriminate in order to offend the policy of maintaining a free-flowing national economy. As demonstrated in *Hunt*, a statute that on its face restricts both intrastate and interstate transactions may violate the Clause by having the "practical effect" of discriminating in its operation. If discrimination results from a statute, the burden falls upon the state or local government to demonstrate legitimate local benefits justifying the inequality and to show that less discriminatory alternatives cannot protect the local interests.

With this background, the unconstitutional discrimination in the Maryland statute becomes apparent. No facial inequality exists; §§(b) and (c) preclude all refiners and producers from marketing gasoline at the retail level. But given the structure of the retail gasoline market in Maryland, the effect of §§(b) and (c) is to exclude a class of predominantly out-of-state gasoline retailers while providing protection from competition to a class of nonintegrated retailers that is overwhelmingly composed of local businessmen.

In 1974, of the 3,780 gasoline service stations in the State, 3,547 were operated by nonintegrated local retail dealers. Of the 233 company-operated stations, 197 belonged to out-of-state integrated producers or refiners. Thirty-four were operated by nonintegrated companies that would not have been affected immediately by the Maryland statute. The only in-state integrated petroleum firm, Crown Central Petroleum, Inc., operated just two service stations. Of the class of stations statutorily insulated from the competition of the out-of-state integrated firms, then, more than 99% were operated by local business interests. Of the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms, operating 98% of the stations in the class.

The discrimination suffered by the out-of-state integrated producers and refiners is significant. Five of the excluded enterprises, Ashland Oil, Inc., BP Oil, Inc., Kayo Oil Co., Petroleum Marketing Corp., and Southern States Cooperative, Inc., market nonbranded gasoline through price competition rather than through brand recognition. Of the 98 stations marketing gasoline in this manner, all but 6 are company operated. The record also contains testimony that the discrimination will burden the operations of major branded companies, such as appellants Exxon, Phillips, Shell, and Gulf, all of which are out-of-state firms. Most importantly, §§(b) and (c) will preclude these companies, as well as those mentioned in the previous paragraph, from competing directly for the profits of retail marketing.

[T]he State appears to be concerned about unfair competitive behavior such as predatory pricing or inequitable allocation of petroleum products by the integrated firms. These are the only examples of specific misconduct asserted in the State's answers. But none of the concerns support the discrimination in §§(b) and (c). There is no proof in the record that any significant portion of the class of out-of-state firms burdened by the

divestiture sections has engaged in such misconduct. Furthermore, predatory pricing and unfair allocation already have been prohibited by both state and federal law. Less discriminatory legislation, which would regulate the leasing of all service stations, not just those owned by the out-of-state integrated producers and refiners, could prevent whatever evils arise from short-term leases.

The Court also found discrimination based on the disparate impact of a facially neutral law in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). A city adopted an ordinance that required all nonhazardous solid waste in the town to be deposited at a transfer station. The law allowed recyclers to continue to receive solid waste, but they had to bring their nonrecyclables to the transfer station. In other words, the companies could not ship nonrecyclable waste itself and they had to pay a fee at the transfer station even if it had already sorted the waste.

The ordinance was facially neutral and applied to both in-state and out-of-state companies. Nonetheless, the Court deemed the law discriminatory because of its effect on out-of-staters: "While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach. . . . [T]he flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."

By contrast, in United Haulers Assn. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007), the Court found constitutional an ordinance very similar to that which it struck down in *C&A Carbone.* In *C&A Carbone*, the city had a "flow control ordinance" for trash that required haulers to bring it to a private facility, whereas in *United Haulers*, the ordinance required that the trash be brought to a state-created public benefit corporation.

The Court found that this distinction was crucial. Chief Justice Roberts, writing for the Court, explained, "We find this difference constitutionally significant. Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas — but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties."

But the dissent by Justice Alito, joined by Justices Stevens and Kennedy, saw this as a distinction without a difference. It was still the government discriminating in favor of in-state businesses at the expense of out-of-state businesses by requiring that trash be brought to the in-state facility. For this dissent, this discrimination was enough to trigger strict scrutiny and invalidate the ordinance.

Facially neutral laws also can be found to be discriminatory if they were enacted for a protectionist purpose: helping in-staters at the expense of out-of-staters. Although the

following two cases involve discussion of both purpose and effect, in the former, West Lynn Creamery, Inc. v. Healy, the Court invalidated a state law largely because of its discriminatory purpose, but in the latter case, Minnesota v. Clover Leaf Creamery Co., the Court upheld the law by finding that the law did not have a discriminatory objective.

WEST LYNN CREAMERY, INC. v. HEALY, COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF FOOD & AGRICULTURE

512 U.S. 186 (1994)

Justice STEVENS delivered the opinion of the Court.

A Massachusetts pricing order imposes an assessment on all fluid milk sold by dealers to Massachusetts retailers. About two-thirds of that milk is produced out of State. The entire assessment, however, is distributed to Massachusetts dairy farmers. The question presented is whether the pricing order unconstitutionally discriminates against interstate commerce. We hold that it does.

Petitioner West Lynn Creamery, Inc., is a milk dealer licensed to do business in Massachusetts. It purchases raw milk, which it processes, packages, and sells to wholesalers, retailers, and other milk dealers. About 97% of the raw milk it purchases is produced by out-of-state farmers. Petitioner LeComte's Dairy, Inc., is also a licensed Massachusetts milk dealer. It purchases all of its milk from West Lynn and distributes it to retail outlets in Massachusetts.

In the 1980s and early 1990s, Massachusetts dairy farmers began to lose market share to lower cost producers in neighboring States. In response, the Governor of Massachusetts appointed a Special Commission to study the dairy industry. The commission found that many producers had sold their dairy farms during the past decade and that if prices paid to farmers for their milk were not significantly increased, a majority of the remaining farmers in Massachusetts would be "forced out of business within the year."

On January 28, 1992, relying on the commission's report, the Commissioner of the Massachusetts Department of Food and Agriculture (respondent) declared a State of Emergency. [T]he Massachusetts order requires dealers to make payments into a fund that is disbursed to farmers on a monthly basis. The assessments, however, are only on Class I sales and the distributions are only to Massachusetts farmers.

The Commerce Clause also limits the power of the Commonwealth of Massachusetts to adopt regulations that discriminate against interstate commerce. "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . ." New Energy Co. of Ind. v. Limbach (1988).

Respondent's principal argument is that, because "the milk order achieves its goals through lawful means," the order as a whole is constitutional. He argues that the

payments to Massachusetts dairy farmers from the Dairy Equalization Fund are valid, because subsidies are constitutional exercises of state power, and that the order premium which provides money for the fund is valid, because it is a nondiscriminatory tax. Therefore the pricing order is constitutional, because it is merely the combination of two independently lawful regulations. In effect, respondent argues, if the State may impose a valid tax on dealers, it is free to use the proceeds of the tax as it chooses; and if it may independently subsidize its farmers, it is free to finance the subsidy by means of any legitimate tax.

Even granting respondent's assertion that both components of the pricing order would be constitutional standing alone, the pricing order nevertheless must fall. A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not "benefit in-state economic interests by burdening out-of-state competitors."

More fundamentally, respondent errs in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts. By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because "[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." Minnesota v. Clover Leaf Creamery Co. (1981). However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy. So, in this case, one would ordinarily have expected at least three groups to lobby against the order premium, which, as a tax, raises the price (and hence lowers demand) for milk: dairy farmers, milk dealers, and consumers. But because the tax was coupled with a subsidy, one of the most powerful of these groups, Massachusetts dairy farmers, instead of exerting their influence against the tax, were in fact its primary supporters.

More fundamentally, respondent ignores the fact that Massachusetts dairy farmers are part of an integrated interstate market. [T]he purpose and effect of the pricing order are to divert market share to Massachusetts dairy farmers. This diversion necessarily injures the dairy farmers in neighboring States. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.

STATE OF MINNESOTA v. CLOVER LEAF CREAMERY CO.

449 U.S. 456 (1981)

Justice BRENNAN delivered the opinion of the Court.

In 1977, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. The purpose of the Minnesota statute is set out as §1: "The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources. The legislature therefore determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged." Proponents of the legislation argued that it would promote resource conservation, ease solid waste disposal problems, and conserve energy. Relying on the results of studies and other information, they stressed the need to stop introduction of the plastic nonreturnable container before it became entrenched in the market.

After the Act was passed, respondents filed suit in Minnesota District Court, seeking to enjoin its enforcement. The court further found that, contrary to the statement of purpose in §1, the "actual basis" for the Act "was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." The court therefore declared the Act "null, void, and unenforceable."

When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause. If a state law purporting to promote environmental purposes is in reality "simple economic protectionism," we have applied a "virtually per se rule of invalidity." Philadelphia v. New Jersey (1978). Even if a statute regulates "even-handedly," and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc. (1970). Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

A court may find that a state law constitutes "economic protectionism" on proof either of discriminatory effect or of discriminatory purpose. Respondents advance a "discriminatory purpose" argument, relying on a finding by the District Court that the Act's "actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry."

Minnesota's statute does not effect "simple protectionism," but "regulates even-handedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down. E.g., Hughes v. Oklahoma (1979); Philadelphia v. New Jersey [(1978)]; Hunt v. Washington Apple Advertising Comm'n [(1977)]. Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits." We conclude that it is not.

The burden imposed on interstate commerce by the statute is relatively minor. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of container, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles, and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms. Indeed, two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.

Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms. Respondents point out that plastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product. Nevertheless, it is clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of plastic pouches, plastic returnable bottles, and paperboard itself, and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act. Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. We find these local benefits ample to support Minnesota's decision under the Commerce Clause. Moreover, we find no approach with "a lesser impact on interstate activities."

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b. Analysis If a Law Is Deemed Discriminatory

The cases presented above demonstrate that the crucial initial inquiry in dormant Commerce Clause cases is whether the law is discriminatory against out-of-staters. In City of Philadelphia v. New Jersey, the Court said "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." In C&A Carbone, Inc. v. Town of Clarkstown, the Court declared, "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." In Hunt v. Washington State Apple Advertising Commission, the Court stated, "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."

The initial case, Dean Milk Co. v. City of Madison, Wisconsin, illustrates the rigorous scrutiny used when laws are deemed discriminatory. Following it is Maine v. Taylor, the only case thus far in which the Supreme Court has upheld a discriminatory state law challenged under the dormant Commerce Clause.

DEAN MILK CO. v. CITY OF MADISON, WISCONSIN

This appeal challenges the constitutional validity of [a] section of an ordinance of the City of Madison, Wisconsin, regulating the sale of milk and milk products within the municipality's jurisdiction. [The] section in issue makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Appellant is an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. It contended below, as it does here, that both the five-mile limit on pasteurization plants and the twenty-five-mile limit on sources of milk violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution.

The City of Madison is the county seat of Dane County. Within the county are some 5,600 dairy farms with total raw milk production in excess of 600,000,000 pounds annually and more than ten times the requirements of Madison. Aside from the milk supplied to Madison, fluid milk produced in the county moves in large quantities to Chicago and more distant consuming areas, and the remainder is used in making cheese, butter and other products.

Appellant purchases and gathers milk from approximately 950 farms in northern Illinois and southern Wisconsin, none being within twenty-five miles of Madison. Its pasteurization plants are located at Chemung and Huntley, Illinois, about 65 and 85 miles respectively from Madison. Appellant was denied a license to sell its products within Madison solely because its pasteurization plants were more than five miles away. It is conceded that the milk which appellant seeks to sell in Madison is supplied from farms and processed in plants licensed and inspected by public health authorities of Chicago, and is labeled "Grade A" under the Chicago ordinance which adopts the rating standards recommended by the United States Public Health Service.

Upon these facts we find it necessary to determine only the issue raised under the Commerce Clause, for we agree with appellant that the ordinance imposes an undue burden on interstate commerce. [T]his regulation in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.

It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. Moreover, appellee Health Commissioner of Madison testified that as proponent of the local milk ordinance he had submitted the provisions here in controversy and an alternative proposal based on the Model Milk Ordinance recommended by the United States Public Health Service. The model provision imposes no geographical limitation on location of milk sources and processing plants but excludes from the municipality milk

not produced and pasteurized conformably to standards as high as those enforced by the receiving city. In implementing such an ordinance, the importing city obtains milk ratings based on uniform standards and established by health authorities in the jurisdiction where production and processing occur. The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milkshed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot checks the local ratings.

To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation."

MAINE v. TAYLOR & UNITED STATES

477 U.S. 131 (1986)

Justice BLACKMUN delivered the opinion of the Court.

Once again, a little fish has caused a commotion. See Hughes v. Oklahoma (1979); TVA v. Hill (1978). The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing. Appellee Robert J. Taylor operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish, he arranged to have 158,000 live golden shiners delivered to him from outside the State. The shipment was intercepted, and a federal grand jury in the District of Maine indicted Taylor for violating and conspiring to violate the Lacey Act Amendments of 1981. Section 3(a)(2)(A) of those Amendments makes it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."

Taylor moved to dismiss the indictment on the ground that Maine's import ban unconstitutionally burdens interstate commerce and therefore may not form the basis for a federal prosecution under the Lacey Act. Maine intervened to defend the validity of its statute, arguing that the ban legitimately protects the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish.

Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively

discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc. (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in Hughes v. Oklahoma, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

[At] the evidentiary hearing [in] the District Court, [t]hree scientific experts testified for the prosecution and one for the defense. The prosecution experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries. First, Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways. The prosecution experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species. According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species "a physical impossibility." Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish.

Although the proffered justification for any local discrimination against interstate commerce must be subjected to "the strictest scrutiny," Hughes v. Oklahoma, the empirical component of that scrutiny, like any other form of factfinding, is the basic responsibility of district courts, rather than appellate courts. After reviewing the expert testimony presented to the Magistrate, however, we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. The constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.

Justice STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of

nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington State Apple Advertising Comm'n (1977).

Like the District Court, the Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State's burden of proving a legitimate public purpose. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

This is not to derogate the State's interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of non-discrimination in interstate commerce. If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause. Maine's unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology. I respectfully dissent.

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c. Analysis If a Law Is Deemed Nondiscriminatory

If the court concludes that a state's law is not discriminatory—that is, it treats in-staters and out-of-staters alike—then it is subjected to a much less demanding test. Nondiscriminatory laws are upheld as long as the benefits to the government outweigh the burdens on interstate commerce. As presented earlier, it should be remembered that some justices—most notably Chief Justice Rehnquist and Justices Scalia and Thomas—object to the subjectivity of this balancing test and even question whether the dormant Commerce Clause should apply in the absence of state discrimination against out-of-staters. Their arguments should be considered during the reading of the following cases.

The initial case presented below, Pike v. Bruce Church, is the decision most frequently cited as establishing the test used in analyzing laws that are not discriminatory.

LOREN J. PIKE v. BRUCE CHURCH, INC.

397 U.S. 137 (1970)

Justice STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act. A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must "be packed in

regular compact arrangement in closed standard containers approved by the supervisor. . . .” Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional.

The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company’s newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use. The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality than those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoilage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes in the quantity involved can be so packed only in packing sheds, and because no such facilities were available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

We are not dealing here with “state legislation in the field of safety where the propriety of local regulation has long been recognized,” or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests.

But the State’s tenuous interest in having the company’s cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company

build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The following two cases, Bibb v. Navajo Freight Lines and Consolidated Freightways Corp. v. Kassel, are examples of where the Court has used the balancing test to find nondiscriminatory laws unconstitutional.

BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS v. NAVAJO FREIGHT LINES, INC.

359 U.S. 520 (1959)

Justice DOUGLAS delivered the opinion of the Court.

We are asked in this case to hold that an Illinois statute requiring the use of a certain type of rear fender mudguard on trucks and trailers operated on the highways of that State conflicts with the Commerce Clause of the Constitution. The statutory specification for this type of mudguard provides that the guard shall contour the rear wheel, with the inside surface being relatively parallel to the top 90 degrees of the rear 180 degrees of the whole surface. The surface of the guard must extend downward to within 10 inches from the ground when the truck is loaded to its maximum legal capacity. The guards must be wide enough to cover the width of the protected tire, must be installed not more than 6 inches from the tire surface when the vehicle is loaded to maximum capacity, and must have a lip or flange on its outer edge of not less than 2 inches.

Appellees, interstate motor carriers holding certificates from the Interstate Commerce Commission, challenged the constitutionality of the Illinois Act. A specially constituted three-judge District Court concluded that it unduly and unreasonably burdened and obstructed interstate commerce, because it made the conventional or straight mudflap, which is legal in at least 45 States, illegal in Illinois, and because the statute, taken together with a Rule of the Arkansas Commerce Commission requiring straight mudflaps, rendered the use of the same motor vehicle equipment in both States

impossible. The statute was declared to be violative of the Commerce Clause and appellants were enjoined from enforcing it.

The power of the State to regulate the use of its highways is broad and pervasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce. South Carolina State Highway Dept. v. Barnwell Bros. (1939).

These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it," we must uphold the statute.

The District Court found that "since it is impossible for a carrier operating in interstate commerce to determine which of its equipment will be used in a particular area, or on a particular day, or days, carriers operating into or through Illinois . . . will be required to equip all their trailers in accordance with the requirements of the Illinois Splash Guard statute." With two possible exceptions the mudflaps required in those States which have mudguard regulations would not meet the standards required by the Illinois statute. The cost of installing the contour mudguards is $30 or more per vehicle. The District Court found that the initial cost of installing those mudguards on all the trucks owned by the appellees ranged from $4,500 to $45,840. There was also evidence in the record to indicate that the cost of maintenance and replacement of these guards is substantial.

Illinois introduced evidence seeking to establish that contour mudguards had a decided safety factor in that they prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle. But the District Court in its opinion stated that it was "conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states," and that "there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways." These hazards were found to be occasioned by the fact that this new type of mudguard tended to cause an accumulation of heat in the brake drum, thus decreasing the effectiveness of brakes, and by the fact that they were susceptible of being hit and bumped when the trucks were backed up and of falling off on the highway.

An order of the Arkansas Commerce Commission requires that trailers operating in that State be equipped with straight or conventional mudflaps. Vehicles equipped to meet the standards of the Illinois statute would not comply with Arkansas standards, and vice versa. Thus if a trailer is to be operated in both States, mudguards would have to be interchanged, causing a significant delay in an operation where prompt movement may be of the essence. It was found that from two to four hours of labor are required to install or remove a contour mudguard. Moreover, the contour guard is attached to the trailer by welding and if the trailer is conveying a cargo of explosives (e.g., for the United States

Government) it would be exceedingly dangerous to attempt to weld on a contour mudguard without unloading the trailer.

It was also found that the Illinois statute seriously interferes with the "interline" operations of motor carriers—that is to say, with the interchanging of trailers between an originating carrier and another carrier when the latter serves an area not served by the former. These "interline" operations provide a speedy through-service for the shipper. Interlining contemplates the physical transfer of the entire trailer; there is no unloading and reloading of the cargo. The interlining process is particularly vital in connection with shipment of perishables, which would spoil if unloaded before reaching their destination, or with the movement of explosives carried under seal. Of course, if the originating carrier never operated in Illinois, it would not be expected to equip its trailers with contour mudguards. Yet if an interchanged trailer of that carrier were hauled to or through Illinois, the statute would require that it contain contour guards. Since carriers which operate in and through Illinois cannot compel the originating carriers to equip their trailers with contour guards, they may be forced to cease interlining with those who do not meet the Illinois requirements. Over 60 percent of the business of 5 of the 6 plaintiffs is interline traffic. For the other it constitutes 30 percent. All of the plaintiffs operate extensively in interstate commerce, and the annual mileage in Illinois of none of them exceeds 7 percent of total mileage.

We deal not with absolutes but with questions of degree. The state legislatures plainly have great leeway in providing safety regulations for all -vehicles—interstate as well as local. Our decisions so hold. Yet the heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations.

Similarly, the Court has invalidated state laws restricting truck size as violating the dormant commerce clause even though they are not discriminatory against out-of-staters. In Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978), the Court unanimously declared unconstitutional a Wisconsin law that generally prevented the operation on state highways of trucks longer than 55 feet and of double-trailer trucks. The law prohibited 65-foot double-trailer trucks, while allowing 55-foot single trucks.

The Court concluded that the "regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." The Court explained that the law put a "substantial burden on the interstate movement of goods" by limiting the ability of trucks to enter Wisconsin. Additionally, the Court said that the State "failed to make even a colorable showing that its regulations contribute to highway safety."

Likewise, in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), the Court declared unconstitutional an Iowa law banning 65-foot double trailers. The Court again weighed the "asserted safety purpose against the degree of interference with interstate commerce." The Court said that the "State failed to present any persuasive evidence that 65-foot doubles are less safe than 55-foot singles. . . . Statistical studies supported the view that 65-foot doubles are at least as safe overall as 55-foot singles and 60-foot doubles." Moreover, the Court found that the Iowa law "substantially burdens interstate

commerce" by forcing these trucks to avoid Iowa or to detach the trailers and ship them separately.

One particular type of nondiscriminatory law is worth noting: The Court has consistently declared unconstitutional state laws that regulate the out-of-state conduct of businesses. In Edgar v. MITE Corp., 457 U.S. 624 (1982), the Court declared unconstitutional an Illinois law that required the Secretary of State to adjudicate the fairness of tender offers for the purchase of corporate stock and to reject the transaction if the offer was inequitable or would work a fraud on the sellers. The Court said that the law was a "direct restraint on interstate commerce" because the state was controlling "conduct beyond the boundaries of the state." The state law regulated sales of stock that occurred outside of Illinois. The Court applied the balancing test and found that the law was unconstitutional because it substantially burdened interstate commerce by "hindering the reallocation of economic resources to their highest-valued use," but there was "nothing to be weighed in the balance to sustain the law."

Similarly, Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), involved a New York law that required liquor distillers selling wholesale in the state to file a monthly price schedule, to sell at those prices in New York, and to sell at the lowest prices the distiller charged wholesale in any other state for the same month. The Court found the latter provision to violate the dormant Commerce Clause because it had the "practical effect of . . . control[ling] liquor prices in other states." The Court explained, "While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not project its legislation into other States by regulating the price to be paid for liquor in those states."

In Healy v. The Beer Institute, 491 U.S. 324 (1989), the Court declared unconstitutional a Connecticut law that required beer companies to post their prices each month and to attest that the prices were not higher than their prices in the four states bordering Connecticut. The Court noted that "the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." The Court said therefore that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." The Connecticut law was declared unconstitutional because it affected the prices charged out of the state.

SUMMARY

State laws that discriminate against out-of-staters are almost always declared unconstitutional. Such a law will be allowed only if it is proven that the law is necessary —the least restrictive means—to achieve a nonprotectionist purpose. If a law does not discriminate against out-of-staters, the Court balances its burdens on interstate commerce against its benefits. The inquiry is fact dependent and the outcome obviously turns on how the Court appraises the burdens and the benefits.

d. Exceptions to the Dormant Commerce Clause

There are two exceptions where laws that otherwise would violate the dormant Commerce Clause will be allowed. One exception is if Congress approves the state law. Even a clearly unconstitutional, discriminatory state law will be allowed if approved by

Congress because Congress has plenary power to regulate commerce among the states. The second exception is termed the "market participant exception": A state may favor its own citizens in receiving benefits from government programs or in dealing with government-owned businesses. Each exception is presented in turn.

CONGRESSIONAL APPROVAL

The Supreme Court consistently has held that the Constitution empowers Congress to regulate commerce among the states and that therefore state laws burdening commerce are permissible, even when they otherwise would violate the dormant Commerce Clause, if they have been approved by Congress. The Court thus declared, "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."[17] This means that Congress may "[confer] . . . upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[18]

This principle has long been followed. For example, in In re Rahrer, 140 U.S. 545 (1891), the Court upheld a state law restricting the importation and sale of alcoholic beverages. Earlier, the Court had declared unconstitutional an almost identical law from another state,[19] but Congress then adopted a law expressly permitting such state regulation of alcoholic beverages. In light of the new federal statute, the Court shifted positions and allowed the state law. The Court said that "[t]he power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State."

Of course, if Congress has acted, the commerce power no longer is dormant. The issue would be whether the federal law is a constitutional exercise of the commerce power; if so, the law must be followed even if it means upholding laws that otherwise would violate the dormant Commerce Clause. It is interesting that this is one of the few areas where Congress has the clear authority to overrule a Supreme Court decision interpreting the Constitution. If the Court deems a matter to violate the dormant Commerce Clause, Congress can respond by enacting a law approving the action and thereby effectively overruling the Supreme Court. However, although the law will not violate the dormant Commerce Clause, it still can be challenged under other constitutional provisions, such as equal protection or the Privileges and Immunities Clause of Article IV.

One of the most important areas where the Supreme Court has found congressional approval to authorize state laws that otherwise would violate the dormant Commerce Clause concerns regulation of the insurance industry.

WESTERN & SOUTHERN LIFE INSURANCE CO. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA

451 U.S. 648 (1981)

Justice BRENNAN delivered the opinion of the Court.

Section 685 of the California Insurance Code imposes a retaliatory tax on out-of-state insurers doing business in California, when the insurer's State of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California. This case presents the question of the constitutionality of retaliatory taxes assessed by the State of California against appellant Western & Southern Life Insurance Co., an Ohio corporation, and paid under protest for the years 1965 through 1971.

In a long line of cases stretching back to the early days of the Republic, however, this Court has recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce. Even in the absence of congressional action, the courts may decide whether state regulations challenged under the Commerce Clause impermissibly burden interstate commerce.

Our decisions do not, however, limit the authority of Congress to regulate commerce among the several States as it sees fit. In the exercise of this plenary authority, Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. BT Investment Managers, Inc. (1980). If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. Nevertheless, Western & Southern, joined by the Solicitor General as amicus curiae, argues that the McCarran-Ferguson Act does not permit "anticompetitive state taxation that discriminates against out-of-state insurers." We find no such limitation in the language or history of the Act.

Section 1 of the Act contains a declaration of policy: "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 2 declares: "The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

The unequivocal language of the Act suggests no exceptions. We must therefore reject Western & Southern's Commerce Clause challenge to the California retaliatory tax: the McCarran-Ferguson Act removes entirely any Commerce Clause restriction upon California's power to tax the insurance business.

However, it must be remembered that although a law will not violate the dormant Commerce Clause if there is congressional approval, it still can be challenged under other constitutional provisions. Congressional approval does not excuse a violation of equal protection, or the Privileges and Immunities Clause, or other constitutional provisions besides the dormant Commerce Clause. For instance, in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985), the Court found that a state tax that discriminated against out-of-state insurance companies violated the Equal Protection

Clause, even though a federal law permitted such discriminatory taxes and thus there was not a violation of the dormant Commerce Clause.

THE MARKET PARTICIPANT EXCEPTION

The market participant exception provides that a state may favor its own citizens in dealing with government-owned business and in receiving benefits from government programs. In other words, if the state is literally a participant in the market, such as with a state-owned business, and not a regulator, the dormant Commerce Clause does not apply. Discrimination against out-of-staters is allowed that otherwise would be impermissible.

The Court initially articulated the market participant exception in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). In *Hughes*, the Court upheld a Maryland law designed to rid the state of abandoned automobiles by having the state pay for the destruction of inoperable cars. The state required minimal documentation of ownership from in-state scrap processors, but required more elaborate proof from out-of-state scrap processors through either a certificate of title, a police certificate vesting title, or a bill of sale from a police auction. The Court said that the state was a market participant as it was purchasing the cars, and therefore its discriminatory actions against out-of-staters did not violate the dormant Commerce Clause. The Court declared, "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."

The following case is an application of the market participant exception and includes a discussion in both the majority and the dissenting opinions as to whether this exception should exist.

REEVES, INC. v. WILLIAM STAKE

447 U.S. 429 (1980)

Justice BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was initiated in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." In 1920, the South Dakota Cement Commission anticipated "[t]hat there would be a ready market for the entire output of the plant within the state." The plant, however, located at Rapid City, soon produced more cement than South Dakotans could use. Over the years, buyers in

no less than nine nearby States purchased cement from the State's plant. Between 1970 and 1977, some 40% of the plant's output went outside the State.

The plant's list of out-of-state cement buyers included petitioner Reeves, Inc. Reeves is a ready-mix concrete distributor organized under Wyoming law and with facilities in Buffalo, Gillette, and Sheridan, Wyoming. From the beginning of its operations in 1958, and until 1978, Reeves purchased about 95% of its cement from the South Dakota plant. In 1977, its purchases were $1,172,000.

As the 1978 construction season approached, difficulties at the plant slowed production. Meanwhile, a booming construction industry spurred demand for cement both regionally and nationally. The plant found itself unable to meet all orders. Faced with the same type of "serious cement shortage" that inspired the plant's construction, the Commission "reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis."

Reeves, which had no pre-existing long-term supply contract, was hit hard and quickly by this development. On June 30, 1978, the plant informed Reeves that it could not continue to fill Reeves' orders, and on July 5, it turned away a Reeves truck. Unable to find another supplier, Reeves was forced to cut production by 76% in mid-July. On July 19, Reeves brought this suit against the Commission, challenging the plant's policy of preferring South Dakota buyers, and seeking injunctive relief.

The basic distinction between States as market participants and States as market regulators makes good sense and sound law. The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "'as guardian and trustee for its people,'" and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.

Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, the adjustment of interests in this context is a task better suited for Congress than this Court.

South Dakota, as a seller of cement, unquestionably fits the "market participant" label more comfortably than a State acting to subsidize local scrap processors.

Justice POWELL, with whom Mr. Justice BRENNAN, Mr. Justice WHITE, and Mr. Justice STEVENS join, dissenting.

The South Dakota Cement Commission has ordered that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled. This policy represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent. The Court, however, finds no violation of the Commerce Clause, solely because the State produces the cement. I agree with the Court that the State of South Dakota may provide cement for its public needs without violating the Commerce Clause. But I cannot agree that South Dakota may withhold its cement from interstate commerce in order to benefit private citizens and businesses within the State.

The need to ensure unrestricted trade among the States created a major impetus for the drafting of the Constitution. "The power over commerce . . . was one of the primary objects for which the people of America adopted their government. . . ." Gibbons v. Ogden (1824). Indeed, the Constitutional Convention was called after an earlier convention on trade and commercial problems proved inconclusive. C. Beard, An Economic Interpretation of the Constitution 61-63 (1935).

The application of the Commerce Clause to this case should turn on the nature of the governmental activity involved. If a public enterprise undertakes an "integral operatio[n] in areas of traditional governmental functions," National League of Cities v. Usery (1976), the Commerce Clause is not directly relevant. If, however, the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.

This distinction derives from the power of governments to supply their own needs and from the purpose of the Commerce Clause itself, which is designed to protect "the natural functioning of the interstate market." In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause. But when a State itself becomes a participant in the private market for other purposes, the Constitution forbids actions that would impede the flow of interstate commerce. These categories recognize no more than the "constitutional line between the State as government and the State as trader." New York v. United States (1946).

I share the Court's desire to preserve state sovereignty. But the Commerce Clause long has been recognized as a limitation on that sovereignty, consciously designed to maintain a national market and defeat economic provincialism. The Court today approves protectionist state policies. In the absence of contrary congressional action, those policies now can be implemented as long as the State itself directly participates in the market.

By enforcing the Commerce Clause in this case, the Court would work no unfairness on the people of South Dakota. They still could reserve cement for public projects and share in whatever return the plant generated. They could not, however, use the power of the State to furnish themselves with cement forbidden to the people of neighboring States.

The creation of a free national economy was a major goal of the States when they resolved to unite under the Federal Constitution. The decision today cannot be

reconciled with that purpose.

WHITE v. MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., 460 U.S. 204 (1983): Justice REHNQUIST delivered the opinion of the Court.

In 1979 the mayor of Boston, Massachusetts, issued an executive order which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half bona fide residents of Boston.

We hold that on the record before us the application of the mayor's executive order to the contracts in question did not violate the Commerce Clause of the United States Constitution. Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such. Insofar as the mayor's executive order was applied to projects funded in part with funds obtained from the federal programs described above, the order was affirmatively sanctioned by the pertinent regulations of those programs.

The above decisions are the major Supreme Court cases announcing and applying the market participant exception. In the following case, the Supreme Court imposed a limit on how far a state or local government can go in discriminating under the market participant exception.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. v. COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA

467 U.S. 82 (1984)

Justice WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS joined.

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided that "[p]rimary manufacture within the State of Alaska will be required as a special provision of the contract." Under the primary-manufacture requirement, the successful bidder must partially process the timber prior to shipping it outside of the State. The requirement is imposed by contract and does not limit the export of unprocessed timber not owned by the State. The stated purpose of the requirement is to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis." Governor's Policy Statement. When it imposes the requirement, the State charges a significantly lower price for the timber than it otherwise would.

Petitioner, South-Central Timber Development, Inc., is an Alaska corporation engaged in the business of purchasing standing timber, logging the timber, and shipping the logs

into foreign commerce, almost exclusively to Japan. It does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the Icy Cape sale, it brought an action in Federal District Court seeking an injunction, arguing that the requirement violated the negative implications of the Commerce Clause.

Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities. The precise contours of the market-participant doctrine have yet to be established, however, the doctrine having been applied in only three cases of this Court to date. See White v. Massachusetts Council of Construction Employers, Inc. (1983); Reeves, Inc. v. Stake (1980); Hughes v. Alexandria Scrap Corp. (1976).

The State of Alaska contends that its primary-manufacture requirement fits squarely within the market-participant doctrine, arguing that "Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap.*" However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing in an amount "roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives."

[I]t is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or forgoing the benefits of the subsidy and exporting unprocessed timber. Under the Alaska requirement, however, the choice is made for him: if he buys timber from the State he is not free to take the timber out of state prior to processing.

The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." White v. Massachusetts Council of Construction Workers, Inc. Contrary to the State's contention, the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the

rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract. In sum, the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant.

Justice REHNQUIST, with whom Justice O'CONNOR joins, dissenting.

In my view, the line of distinction drawn in the plurality opinion between the State as market participant and the State as market regulator is both artificial and unconvincing. The plurality draws this line "simply as a matter of intuition," but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause. For example, the plurality complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber-processing market, a classic example of a tying arrangement. And the plurality cites the common-law doctrine of restraints on alienation and the antitrust limits on vertical restraints in dismissing the State's claim that it could accomplish exactly the same result in other ways.

The plurality does offer one other reason for its demarcation of the boundary between these two concepts. "[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity." But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Under existing precedent, the State could accomplish that same result in any number of ways. For example, the State could choose to sell its timber only to those companies that maintain active primary-processing plants in Alaska. Reeves, Inc. v. Stake (1980). Or the State could directly subsidize the primary-processing industry within the State. Hughes v. Alexandria Scrap Corp. (1976). The State could even pay to have the logs processed and then enter the market only to sell processed logs. It seems to me unduly formalistic to conclude that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause.

The underlying policy question is whether there should be a market participant exception. The market participant exception can be criticized on several grounds. First, the dormant Commerce Clause is meant to stop protectionist actions by state governments; protectionism should not be allowed regardless of whether the state is acting in a proprietary or a regulatory capacity. Second, there is not a clear distinction between situations where the government is acting as a regulator and when it is a market participant.

On the other hand, the market participant exception can be defended as allowing citizens in a state to recoup the benefits of the taxes that they pay. Professor Tribe says that the exception is justified by "[t]he sense of fairness in allowing a community to retain the public benefits created by its own public investment."[20] The market participant exception also is defended on the ground that "state spending programs are less coercive than regulatory programs or taxes with similar purposes" and they "seem less hostile to other states and less inconsistent with the concept of union than discriminatory regulation or taxation."[21]

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C. THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, §2

1. Introduction

Another provision that limits state and local regulation is the Privileges and Immunities Clause found in Article IV, §2. The provision states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Supreme Court has interpreted this provision as limiting the ability of a state to discriminate against out-of-staters with regard to fundamental rights or important economic activities. The Court has said that "[t]he section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."[22] As presented below, most cases under the Privileges and Immunities Clause involve challenges to state and local laws that discriminate against out-of-staters with regard to their ability to earn a livelihood.[23] Such discrimination will be allowed only if it is substantially related to achieving a substantial state interest.[24]

Discrimination against citizens of other states is a prerequisite for application of the Privileges and Immunities Clause.[25] The Supreme Court long has held that the term "citizen" in the Privileges and Immunities Clause is limited to individuals who are United States citizens.[26] Thus, corporations cannot sue under the Privileges and Immunities Clause because, by definition, they are not citizens.[27] Nor can aliens sue under the Privileges and Immunities Clause.

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The dormant Commerce Clause and the Privileges and Immunities Clause overlap: Both can be used to challenge state and local laws that discriminate against out-of-staters. In fact, the Supreme Court has spoken of the "mutually reinforcing relationship" between the dormant Commerce Clause and the Privileges and Immunities Clause.[28]

There are, however, some key differences. First, the Privileges and Immunities Clause can be used only if there is discrimination against out-of-staters. The dormant

Commerce Clause, as explained above, can be used to challenge state and local laws that burden interstate commerce regardless of whether they discriminate against out-of-staters. However, under the dormant Commerce Clause, laws that discriminate are much more likely to be invalidated.

Second, corporations and aliens can sue under the dormant Commerce Clause, but not the Privileges and Immunities Clause. The Privileges and Immunities Clause is expressly limited to "citizens," whereas no such limitation exists with regard to the dormant Commerce Clause.

Third, there are two exceptions to the dormant Commerce Clause that do not apply to the Privileges and Immunities Clause. If Congress approves state laws, then they do not violate the dormant Commerce Clause; if Congress has acted, its commerce power no longer is dormant. But congressional approval does not excuse a law that violates the Privileges and Immunities Clause. Also, as described above, there is a market participant exception to the dormant Commerce Clause that allows states to favor their own citizens in receiving benefits from government programs and in dealing with government-owned businesses. No such exception exists for the Privileges and Immunities Clause. Thus, in White v. Massachusetts Council of Construction Employers, Inc., presented above, the Court found that a city law requiring that 50 percent of those hired to work on city construction projects be residents of the city did not violate the dormant Commerce Clause because of the market participant exception.[29] But a year later, in United Building & Construction Trades Council v. Mayor & Council of Camden, presented below, the Court declared unconstitutional a city's ordinance requiring that at least 40 percent of the employees on city projects be city residents. The Court found that the law violated the Privileges and Immunities Clause and explained that the market participant exception applies only with regard to dormant Commerce Clause challenges.

2. Analysis Under the Privileges and Immunities Clause

When a challenge is brought under the Privileges and Immunities Clause, there are two basic questions.[30] First, has the state discriminated against out-of-staters with regard to privileges and immunities that it accords its own citizens? Second, if there is such discrimination, is there a sufficient justification for the discrimination? The Privileges and Immunities Clause is not absolute, but it creates a strong presumption against state and local laws that discriminate against out-of-staters with regard to fundamental rights or important economic activities. Both of these issues are discussed in most of the cases below. However, the first set of cases focus primarily on the former issue; the second set of decisions especially discuss the latter question.

WHAT ARE THE "PRIVILEGES AND IMMUNITIES OF CITIZENSHIP"?

The classic statement of the meaning of the phrase "privileges and immunities" of citizenship was provided by Justice Bushrod Washington in Corfield v. Coryell, 6 F. Cas. 546, 551, 4 Wash. C.C. 371, No. 3230 (Cir. Ct. E.D. Pa. 1823), when he said that the clause protects interests that "are fundamental; which belong, of right, to the citizens of all free governments. [They] may be 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."[31]

Subsequently, the Court said that the Clause applies "[o]nly with respect to those privileges and immunities bearing upon the vitality of the Nation as a single entity."[32] The Court also has said that the issue is whether the interest is "sufficiently fundamental to the promotion of interstate harmony."[33]

Yet these and similar statements are abstract and provide relatively little guidance in identifying what are the "privileges and immunities of citizens" under Article IV. It is well settled that the Privileges and Immunities Clause is meant to limit the ability of states to discriminate against citizens from other states, but it is not at all clear as to what constitutes the area—privileges and immunities—where discrimination is forbidden. Indeed, the Supreme Court has acknowledged that "the contours of [the Clause] are not well developed."[34]

Examining the cases concerning the Privileges and Immunities Clause reveals that the Court primarily has applied it in two contexts: (1) when a state is discriminating against out-of-staters with regard to constitutional rights and (2) when a state is discriminating against out-of-staters with regard to important economic activities. The latter almost always arises in the context of a state discriminating against out-of-staters with regard to their ability to earn a livelihood. The Court has refused to apply the Privileges and Immunities Clause in situations where the discrimination against out-of-staters has involved neither constitutional rights nor important economic activities.

The rights enumerated in the Bill of Rights seem the most obvious and the most basic "privileges and immunities of citizenship."[35] Generally, however, there is no need to use the Privileges and Immunities Clause to protect constitutionally guaranteed rights. If a state were to prevent out-of-staters from engaging in religious worship, a challenge certainly could be brought under the Privileges and Immunities Clause. Most likely, though, the suit would be brought under the First Amendment as applied to the states through the Fourteenth Amendment.

Although such cases arise only relatively rarely, the Privileges and Immunities Clause can be used to challenge state and local laws that discriminate against out-of-staters with regard to the exercise of constitutional rights. For example, in Doe v. Bolton, 410 U.S. 179 (1973), the Supreme Court concluded that a state could not limit the ability of out-of-staters to obtain abortions in the state. *Doe* was a companion case to Roe v. Wade[36] and involved a Georgia law that allowed residents to obtain an abortion if a physician determined that continuing the pregnancy would endanger a woman's life or health, the fetus would be born with a serious defect, or the pregnancy resulted from rape. The Court declared the law unconstitutional and invalidated the residency requirement based on the Privileges and Immunities Clause. The Court said, "Just as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade, so must it protect persons who enter Georgia seeking the medical services that are available there. A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve."

But the Court has made clear that for the Privileges and Immunities Clause to be applied on this basis a fundamental right must be involved. In McBurney v. Young, 569 U.S. 221 (2013), the Court considered "whether the Virginia Freedom of Information Act violates either the Privileges and Immunities Clause of Article IV. . . . The Virginia Freedom of Information Act (FOIA) provides that 'all public records shall be open to inspection and copying by any citizens of the Commonwealth,' but it grants no such right to non-Virginians." The Court concluded that the law did not violate the Privileges and Immunities Clause because no fundamental right was implicated. The Court explained: "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. It certainly cannot be said that such a broad right has '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.' No such right was recognized at common law. Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them."

The vast majority of cases under the Privileges and Immunities Clause involve states discriminating against out-of-staters with regard to their ability to earn their livelihood. The following cases are key instances in which the Supreme Court has considered the Privileges and Immunities Clause in this context.

TOOMER v. WITSELL

334 U.S. 385 (1948)

Chief Justice VINSON delivered the opinion of the Court.

This is a suit to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. The statutes appellants challenge relate to shrimping during the open season in the three-mile belt: Section 3300 of the South Carolina Code provides that the waters in that area shall be "a common for the people of the State for the taking of fish." Section 3379, as amended in 1947, requires payment of a license fee of $25 for each shrimp boat owned by a resident, and of $2,500 for each one owned by a non-resident.

Appellants, who initiated the action, are five individual fishermen, all citizens and residents of Georgia, and a non-profit fish dealers' organization incorporated in Florida. The purpose and effect of this statute, they contend, is not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents. As such, the statute is said to violate the Privileges and Immunities Clause of Art. IV, §2, of the Constitution and the equal protection clause of the Fourteenth Amendment.

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and

official retaliation. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists. In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Like many other constitutional provisions, the Privileges and Immunities Clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

With these factors in mind, we turn to a consideration of the constitutionality of §3379. By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary. As justification for the statute, appellees urge that the State's obvious purpose was to conserve its shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements. But in any event, appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the Privileges and Immunities Clause. It overlooks the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed. Thus, §3379 must be held unconstitutional.

UNITED BUILDING & CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY v. MAYOR & COUNCIL OF THE CITY OF CAMDEN

465 U.S. 208 (1984)

Justice REHNQUIST delivered the opinion of the Court

A municipal ordinance of the city of Camden, New Jersey requires that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. Appellant, the United Building and Construction Trades Council of Camden and Vicinity (the Council), challenges that ordinance as a violation of the Privileges and Immunities Clause, Article IV, §2, of the United States Constitution.

We first address the argument, accepted by the Supreme Court of New Jersey, that the Clause does not even apply to a municipal ordinance such as this. Two separate contentions are advanced in support of this position: first, that the Clause only applies to laws passed by a State and, second, that the Clause only applies to laws that

discriminate on the basis of state citizenship. The first argument can be quickly rejected. The fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause. First of all, one cannot easily distinguish municipal from state action in this case: the municipal ordinance would not have gone into effect without express approval by the State Treasurer. More fundamentally, a municipality is merely a political subdivision of the State from which its authority derives. It is as true of the Privileges and Immunities Clause as of the Equal Protection Clause that what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State.

The second argument merits more consideration. The New Jersey Supreme Court concluded that the Privileges and Immunities Clause does not apply to an ordinance that discriminates solely on the basis of municipal residency. The Clause is phrased in terms of state citizenship and was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Paul v. Virginia (1869).

Municipal residency classifications, it is argued, simply do not give rise to the same concerns. We cannot accept this argument. We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. A person who is not residing in a given State is ipso facto not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded. Given the Camden ordinance, an out-of-state citizen who ventures into New Jersey will not enjoy the same privileges as the New Jersey citizen residing in Camden. It is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause. But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity and they must "not be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation." Toomer v. Witsell (1948). We conclude that Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged.

Application of the Privileges and Immunities Clause to a particular instance of discrimination against out-of-state residents entails a two-step inquiry. As an initial matter, the court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause. As a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the purview of the Privileges and Immunities Clause." Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity.

The conclusion that Camden's ordinance discriminates against a protected privilege does not, of course, end the inquiry. It does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. The city of Camden contends that its ordinance is necessary to counteract grave economic

and social ills. Spiralling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city have eroded property values and depleted the city's tax base. The resident hiring preference is designed, the city contends, to increase the number of employed persons living in Camden and to arrest the "middle class flight" currently plaguing the city. The city also argues that all non-Camden residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a "source of the evil at which the statute is aimed." That is, they "live off" Camden without "living in" Camden. Camden contends that the scope of the discrimination practiced in the ordinance, with its municipal residency requirement, is carefully tailored to alleviate this evil without unreasonably harming nonresidents, who still have access to 60% of the available positions.

Nonetheless, we find it impossible to evaluate Camden's justification on the record as it now stands. No trial has ever been held in the case. No findings of fact have been made. The Supreme Court of New Jersey certified the case for direct appeal after the brief administrative proceedings that led to approval of the ordinance by the State Treasurer. It would not be appropriate for this Court either to make factual determinations as an initial matter or to take judicial notice of Camden's decay. We, therefore, deem it wise to remand the case to the New Jersey Supreme Court. That court may decide, consistent with state procedures, on the best method for making the necessary findings.

In Toomer v. Witsell and United Building & Construction Trades Council v. Mayor & Council of Camden, the Court stated that discrimination against out-of-staters with regard to their ability to earn their livelihood violated the Privileges and Immunities Clause. In the following case, the Court made it clear that the clause is limited to protecting this economic interest and civil liberties; discrimination against out-of-staters in other areas is not prohibited by the Privileges and Immunities Clause of Article IV.

LESTER BALDWIN v. FISH & GAME COMMISSION OF MONTANA

436 U.S. 371 (1978)

Justice BLACKMUN delivered the opinion of the Court.

This case presents issues under the Privileges and Immunities Clause of the Constitution's Art. IV, §2, as to the constitutional validity of disparities, as between residents and nonresidents, in a State's hunting license system. For the 1975 hunting season, a Montana resident could purchase a license solely for elk for $4. The nonresident, however, in order to hunt elk, was required to purchase a combination license at a cost of $151; this entitled him to take one elk and two deer. For the 1976 season, the Montana resident could purchase a license solely for elk for $9. The nonresident, in order to hunt elk was required to purchase a combination license at a cost of $225; this entitled him to take one elk, one deer, one black bear, and game birds, and to fish with hook and line. A resident was not required to buy any combination of licenses, but if he did, the cost to him of all the privileges granted by the nonresident combination license was $30. The nonresident thus paid 7½ times as much as the resident, and if the nonresident wished to hunt only elk, he paid 25 times as much as the resident.

Appellant Lester Baldwin is a Montana resident. He also is an outfitter holding a state license as a hunting guide. The majority of his customers are nonresidents who come to Montana to hunt elk and other big game. Appellants Carlson, Huseby, Lee and Moris are residents of Minnesota. They have hunted big game, particularly elk, in Montana in past years and wish to continue to do so.

In 1975, the five appellants, disturbed by the difference in the kinds of Montana elk-hunting licenses available to nonresidents, as contrasted with those available to residents of the State, and by the difference in the fees the nonresident and the resident must pay for their respective licenses, instituted the present federal suit for declaratory and injunctive relief and for reimbursement, in part, of fees already paid.

Appellants strongly urge here that the Montana licensing scheme for the hunting of elk violates the Privileges and Immunities Clause of Art. IV §2, of our Constitution. That Clause is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789.

When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State; in the ownership and disposition of privately held property within the State; and in access to the courts of the State.

It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting. Does the distinction made by Montana between residents and nonresidents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause? Merely to ask the question seems to provide the answer. We repeat much of what already has been said above: Elk hunting by nonresidents in Montana is a recreation and a sport. In itself—wholly apart from license fees—it is costly and obviously available only to the wealthy nonresident or to the one so taken with the sport that he sacrifices other values in order to indulge in it and to enjoy what it offers. It is not a means to the nonresident's livelihood. The mastery of the animal and the trophy are the ends that are sought; appellants are not totally excluded from these. The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.

Appellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause.

Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not—and cannot— contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

WHAT JUSTIFICATIONS ARE SUFFICIENT TO PERMIT DISCRIMINATION?

The Court repeatedly has stated that the Privileges and Immunities Clause is not absolute. There is discussion in the above cases as to what interests are sufficient to permit discrimination. The Court's most detailed consideration of this issue is in the following decision.

SUPREME COURT OF NEW HAMPSHIRE v. KATHRYN A. PIPER

470 U.S. 274 (1985)

Justice POWELL delivered the opinion of the Court.

The Rules of the Supreme Court of New Hampshire limit bar admission to state residents. We here consider whether this restriction violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, §2.

Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border. In 1979, she applied to take the February 1980 New Hampshire bar examination. Piper submitted with her application a statement of intent to become a New Hampshire resident. Following an investigation, the Board of Bar Examiners found that Piper was of good moral character and met the other requirements for admission. She was allowed to take, and passed, the examination. Piper was informed by the Board that she would have to establish a home address in New Hampshire prior to being sworn in.

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. It is therefore not surprising that this Court repeatedly has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Toomer v. Witsell. There is nothing in [prior decisions] suggesting that the practice of law should not be viewed as a "privilege" under Art. IV, §4, 6. Like the occupations considered in our earlier cases, the practice of law is important to the national economy.

The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some

cases, representation by nonresident counsel may be the only means available for the vindication of federal rights.

The conclusion that Rule 42 deprives nonresidents of a protected privilege does not end our inquiry. The Court has stated that "[l]ike many other constitutional provisions, the Privileges and Immunities Clause is not an absolute." The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

The Supreme Court of New Hampshire offers several justifications for its refusal to admit nonresidents to the bar. It asserts that nonresident members would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do pro bono and other volunteer work in the State. We find that none of these reasons meets the test of "substantiality," and that the means chosen do not bear the necessary relationship to the State's objectives.

There is no evidence to support appellant's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer—anymore than a resident—would disserve his clients by failing to familiarize himself with the rules. As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues of $125.

New Hampshire's "simple residency" requirement is underinclusive as well, because it permits lawyers who move away from the State to retain their membership in the bar. There is no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the State.

We also find the appellant's second justification to be without merit, for there is no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live. Furthermore, a nonresident lawyer may be disciplined for unethical conduct.

There is more merit to the appellant's assertion that a nonresident member of the bar at times would be unavailable for court proceedings. In the course of litigation, pretrial hearings on various matters often are held on short notice. At times a court will need to confer immediately with counsel. Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding. Nevertheless, we do not believe that this type of problem justifies the exclusion of nonresidents from the state bar. One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire. Furthermore, in those

cases where the nonresident counsel will be unavailable on short notice, the State can protect its interests through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

The final reason advanced by appellant is that nonresident members of the state bar would be disinclined to do their share of pro bono and volunteer work. Perhaps this is true to a limited extent, particularly where the member resides in a distant location. We think it is reasonable to believe, however, that most lawyers who become members of a state bar will endeavor to perform their share of these services. This sort of participation, of course, would serve the professional interest of a lawyer who practices in the State. Furthermore, a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.

In summary, appellant neither advances a "substantial reason" for its discrimination against nonresident applicants to the bar, nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives.

Our holding in this case does not interfere with the ability of the States to regulate their bars. The nonresident who seeks to join a bar, unlike the pro hac vice applicant, must have the same professional and personal qualifications required of resident lawyers. Furthermore, the nonresident member of the bar is subject to the full force of New Hampshire's disciplinary rules.

Justice REHNQUIST, dissenting.

Today the Court holds that New Hampshire cannot decide that a New Hampshire lawyer should live in New Hampshire. This may not be surprising to those who view law as just another form of business frequently practiced across state lines by interchangeable actors; the Privileges and Immunities Clause of Art. IV, §2, has long been held to apply to States' attempts to discriminate against nonresidents who seek to ply their trade interstate. The decision will be surprising to many, however, because it so clearly disregards the fact that the practice of law is—almost by definition—fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State. The fact that each State is free, in a large number of areas, to establish independently of the other States its own laws for the governance of its citizens, is a fundamental precept of our Constitution that, I submit, is of equal stature with the need for the States to form a cohesive union. What is at issue here is New Hampshire's right to decide that those people who in many ways will intimately deal with New Hampshire's self-governance should reside within that State.

[A] State has a very strong interest in seeing that its legislators and its judges come from among the constituency of state residents, so that they better understand the local interests to which they will have to respond. Unlike the Court, I would recognize that the State also has a very "substantial" interest in seeing that its lawyers also are members of that constituency.

My belief that the practice of law differs from other trades and businesses for Art. IV, §2, purposes is not based on some notion that law is for some reason a superior profession.

The reason that the practice of law should be treated differently is that law is one occupation that does not readily translate across state lines. Certain aspects of legal practice are distinctly and intentionally nonnational; in this regard one might view this country's legal system as the antithesis of the norms embodied in the Art. IV Privileges and Immunities Clause. Put simply, the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze law and policy are better equipped to write those state laws and adjudicate cases arising under them. The State therefore may decide that it has an interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn. A residency law such as the one at issue is the obvious way to accomplish these goals. Since at any given time within a State there is only enough legal work to support a certain number of lawyers, each out-of-state lawyer who is allowed to practice necessarily takes legal work that could support an in-state lawyer, who would otherwise be available to perform various functions that a State has an interest in promoting.

In addition, I find the Court's "less restrictive means" analysis both ill-advised and potentially unmanageable. Initially I would note, as I and other Members of this Court have before, that such an analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another "less restrictive" way to write it. This approach to judicial review, far more than the usual application of a standard of review, tends to place courts in the position of second-guessing legislators on legislative matters. Surely this is not a consequence to be desired. In any event, I find the less-restrictive-means analysis, which is borrowed from our First Amendment jurisprudence, to be out of place in the context of the Art. IV Privileges and Immunities Clause.

There is yet another interest asserted by the State that I believe would justify a decision to limit membership in the state bar to state residents. The State argues that out-of-state bar members pose a problem in situations where counsel must be available on short notice to represent clients on unscheduled matters. The Court brushes this argument aside, speculating that "a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire," and suggesting that in any event the trial court could alleviate this problem by requiring the lawyer to retain local counsel. Assuming that the latter suggestion does not itself constitute unlawful discrimination under the Court's test, there nevertheless may be good reasons why a State or a trial court would rather not get into structuring attorney-client relationships by requiring the retention of local counsel for emergency matters. The situation would have to be explained to the client, and the allocation of responsibility between resident and nonresident counsel could cause as many problems as the Court's suggestion might cure.

Nor do I believe that the problem can be confined to emergency matters. The Court admits that even in the ordinary course of litigation a trial judge will want trial lawyers to be available on short notice; the uncertainties of managing a trial docket are such that lawyers rarely are given a single date on which a trial will begin; they may be required to "stand by"—or whatever the local terminology is—for days at a time, and then be expected to be ready in a matter of hours, with witnesses, when the case in front of them suddenly settles. A State reasonably can decide that a trial court should not have added to its present scheduling difficulties the uncertainties and added delays fostered by

counsel who might reside 1,000 miles from New Hampshire. If there is any single problem with state legal systems that this Court might consider "substantial," it is the problem of delay in litigation—a subject that has been profusely explored in the literature over the past several years. Surely the State has a substantial interest in taking steps to minimize this problem.

Thus, I think that New Hampshire had more than enough "substantial reasons" to conclude that its lawyers should also be its residents. I would hold that the Rule of the New Hampshire Supreme Court does not violate the Privileges and Immunities Clause of Art. IV.

Notes

1 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

2 Gade v. National Soild Wastes Management Assn., 505 U.S. 88, 96 (1992) (citations omitted).

3 *See* Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996), quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963).

4 505 U.S. at 96. *See, e.g.*, Freightliner Corp. v. Myrick, 514 U.S. 208, 287 (1995); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-605 (1991).

5 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

6 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

7 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

8 *Id*.

9 29 U.S.C. §1144(a).

10 This is a different law from Arizona's SB 1070, which authorizes aggressive law enforcement to decrease the presence in Arizona of those who are not lawfully in the United States. That law and the decision concerning it (Arizona v. United States (2012)) are presented below.

11 Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waits* 18 (1937).

12 17 U.S. (4 Wheat.) 316, 429-430 (1819), presented in Chapter 2.

13 South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 185 (1938).

14 Bendix Autolite Corp. v. Midwesco Enterpries, Inc., 486 U.S. 888 (1988) (Scalia, J., dissenting).

15 Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (Thomas, J., dissenting), quoted above.

16 Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) (Scalia, J., dissenting).

17 Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 652-653 (1981).

18 Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980).

19 Leisy v. Hardin, 135 U.S. 100 (1890).

20 Laurence Tribe, *Constitutional Choices* 145 (1985).

21 Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1194 (1986).

22 Hague v. Committee for Industrial Organization, 307 U.S. 496, 511 (1939).

23 For an excellent discussion of the Clause and its purposes, *see* Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981).

24 *See* United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984).

25 *See* Zobel v. Williams, 457 U.S. 55, 59 n.5 (1982) (finding that an Alaskan law that gave refunds based on duration of state residence did not violate the Privileges and Immunities Clause. The Court said that the law did not discriminate between citizens and noncitizens but among citizens based on duration of residence. The Court did find that the law violated equal protection.).

26 The Court has held that in determining whether a person is a citizen of a state, residency in the state is synonymous with state citizenship. *See* United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 216 (1984) ("[I]t is now established that the terms 'citizen' and 'resident' are essentially 'interchangeable' for purposes of analysis of most cases under the Privileges and Immunities Clause.") (citations omitted).

27 Blake v. McClung, 172 U.S. 239 (1898); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); *see also* Hemphill v. Orloff, 277 U.S. 537 (1928) (trust cannot sue under the Privileges and Immunities Clause because of its corporate form).

28 Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

29 460 U.S. 204 (1983).

30 The Supreme Court has expressly referred to this as "a two-step inquiry." United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 218 (1984).

31 In *Corfield*, the court of appeals upheld a New Jersey law that prevented nonresidents from gathering clams from state waters. The court said that clams were the property of the state. Subsequently, the Supreme Court has rejected the view that natural resources, such as animals, are property and not items of commerce. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 222 (1979).

32 Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371, 383 (1978) (citations omitted).

33 United Building & Construction Trades Council v. Mayor & Council of the City of Camden, 465 U.S. at 218.

34 Baldwin v. Montana Fish and Game Commission, 436 U.S. at 380.

35 *See* Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("What more precious 'privilege' of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights?").

36 410 U.S. 113 (1973).

CHAPTER 5

The Structure of The Constitution's Protection of Civil Rights and Civil Liberties

A. INTRODUCTION

The text of the Constitution, apart from the Bill of Rights, contains few provisions concerning individual liberties. Article I, §9, which places limits on Congress's powers, declares that "[t]he 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." Article I, §9 also states, "No Bill of Attainder or ex post facto Law shall be passed." Article I, §10, which contains limits on state government powers, similarly provides, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or law impairing the Obligation of Contracts."

Article III, §2 states that "[t]he 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." Article III, §3 also provides, "Treason against the United States, shall consist only in levying War against them or, in adhering to their Enemies, giving them Aid and Comfort. 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." Section 3 concludes by declaring that although Congress may prescribe the punishment for treason, there shall be no "Corruption of Blood, or Forfeiture except during the Life of the Person attained." In other words, only the traitor can be punished; family members and future generations cannot be sanctioned because of someone else's wrongdoing.

Finally, Article VI concludes that "no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States." In Torcaso v. Watkins, 367 U.S. 488 (1961), the Supreme Court used the Free Exercise Clause of the First Amendment to impose a similar requirement on state governments. In *Torcaso*, the Supreme Court declared unconstitutional a state constitutional provision that required a declaration of a belief in God as a prerequisite to taking public office.

Although these provisions are not trivial, they are minor compared with the protection of liberties found in the Bill of Rights. The seven Articles of the Constitution are primarily about the structure of government and not individual rights.

Why is there so little in the text of the Constitution about individual liberties? In part, this was because the framers thought that an enumeration of rights was unnecessary in that they had created a government with limited powers and thus without the authority to violate basic liberties. In part, too, the framers were concerned that the enumeration of some rights in the text of the Constitution inevitably would be incomplete and thus would deny protection to those not listed. The Ninth Amendment was added to address this latter concern and provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Several states, however, were concerned about the absence of an enumeration of rights and ratified the Constitution with a request that it would be amended to add a Bill of Rights. In the first Congress, James Madison drafted 16 amendments; 12 were ratified by Congress and 10 by the states. These became known as the Bill of Rights.

Section B considers the application of the Bill of Rights to states. As discussed below, the Supreme Court initially concluded that the Bill of Rights applied only to the federal

government.[1] The Fourteenth Amendment's clause, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," might have been a basis for applying the Bill of Rights to the states. However, in the *Slaughter-House Cases*, in 1872, the Supreme Court interpreted the clause in an extremely narrow manner and thus precluded its use as a vehicle for applying the Bill of Rights to the states.[2] In the twentieth century, the Supreme Court applied most of the Bill of Rights to the states by finding that the provisions were incorporated into the Due Process Clause of the Fourteenth Amendment.

Section C examines the application of constitutional rights to private entities and individuals. The basic rule, often termed "the state action doctrine," is that such rights only apply to the government; private entities and individuals are not required to comply with the Constitution. The rationale for this doctrine and its exceptions are considered in detail in section C.

B. THE APPLICATION OF THE BILL OF RIGHTS TO THE STATES

1. The Rejection of Application Before the Civil War

The Bill of Rights, of course, is the first ten amendments to the Constitution. The first eight amendments detail protection of individual rights. Some, such as the First Amendment's protection of freedom of speech and religion and the criminal procedure protections of the Fourth, Fifth, and Sixth Amendments, are the subject of frequent litigation. Others, such as the Third Amendment's right against having soldiers quartered in a person's home, have no contemporary significance. 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 Tenth Amendment, discussed in detail in Chapter 2, states, "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."

The issue arose early in American history as to whether the Bill of Rights applies to state and local governments. The Supreme Court definitively answered that question in the following case.

BARRON v. MAYOR & CITY COUNCIL OF BALTIMORE

32 U.S. (7 Pet.) 243 (1833)

[Barron sued the city for taking property without just compensation in violation of the Fifth Amendment. He contended that the city ruined his wharf by diverting streams and thereby made the water too shallow for boats. The issue was whether the Takings Clause of the Fifth Amendment applied to the city.]

Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiff in error contends that the fifth amendment to the constitution, which inhibits the taking of private property for public use without just compensation [has been violated]. He insists, that this amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States.

The question thus presented is, we think, of great importance, but not of much difficulty. 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. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states.

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These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.

From a late-twentieth-century perspective, it is troubling that state and local governments were free to violate basic constitutional rights. Yet, at the time of its

decision, *Barron* made sense because of faith in state constitutions and because of the shared understanding that the Bill of Rights was meant to apply only to the federal government. As Professor John Hart Ely noted, "In terms of the original understanding, *Barron* was almost certainly decided correctly."[3]

2. A False Start in Applying the Bill of Rights to the States: The Privileges or Immunities Clause and the *Slaughter-House Cases*

The Fourteenth Amendment, adopted after the Civil War, declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It might be argued that this provision was meant to apply the Bill of Rights to the states; the Bill of Rights would seem to be the most basic "privileges or immunities" of citizenship. Indeed, Justice Hugo Black declared that "the words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[4]

The historical accuracy of Justice Black's claim concerning the Privileges or Immunities Clause is uncertain. On the one hand, the choice of the words "privileges" and "immunities" suggests that the framers intended to protect fundamental rights from state and local interference. The words "privileges" and "immunities" were already a part of the Constitution in Article IV, §2 (discussed in Chapter 4), which prevents a state from denying citizens of other states the privileges and immunities it accords its own citizens. More than 40 years before the adoption of the Fourteenth Amendment, Justice Washington stated that the Privileges and Immunities Clause in Article IV protected rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."[5]

During the congressional debate over the Fourteenth Amendment, representatives and senators said that the Fourteenth Amendment Privileges or Immunities Clause was meant to protect basic rights from state interference. Senator Howard, for example, quoted Justice Washington's earlier statement as to the meaning of privileges and immunities and declared, "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution."[6] Likewise, Representative Bingham, who is credited with drafting the provision, stated that "the privileges and immunities of citizens of the United States [are] chiefly defined in the first eight amendments to the Constitution."[7]

Yet the historical claim that the Privileges or Immunities Clause was meant to apply the Bill of Rights to the states is very much disputed. Charles Fairman, in an exhaustive study of the framers' intent on this issue, concluded, "[The theory that the] privileges or immunities clause incorporated Amendments I to VIII found no recognition in the practice of Congress, or the action of state legislatures, constitutional conventions, or courts. . . . Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified."[8]

As is so often the case in discussing the framers' intent, there probably was not a single view within the Congress that passed the Fourteenth Amendment or the states that ratified it as to whether the Privileges or Immunities Clause was meant to apply the Bill of Rights to the states. Some of the members of Congress and the state legislatures probably believed that the Privileges or Immunities Clause included the Bill of Rights; some probably didn't think so; and many probably didn't consider the question.

Apart from claims based on the framers' intent, a strong argument can be made that the Privileges or Immunities Clause should be interpreted as applying the Bill of Rights to the states. The claim would be that the provisions of the Bill of Rights are the basic "privileges" and "immunities" possessed by all citizens. That argument, however, was foreclosed in the first Supreme Court case to interpret the Fourteenth Amendment: the *Slaughter-House Cases.*

SLAUGHTER-HOUSE CASES: BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS v. CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTER-HOUSE CO.

83 U.S. (16 Wall.) 36 (1872)

[Seeing a huge surplus of cattle in Texas, the Louisiana legislature gave a monopoly in the livestock landing and the slaughterhouse business for the city of New Orleans to the Crescent City Livestock Landing and Slaughter-House Company. The law required that the company allow any person to slaughter animals in the slaughterhouse for a fixed fee. Several butchers brought suit challenging the grant of the monopoly. They argued that the state law impermissibly violated their right to practice their trade. The butchers invoked many of the provisions of the recently adopted constitutional amendments. They argued that the restriction created involuntary servitude, deprived them of their property without due process of law, denied them equal protection of the laws, and abridged their privileges or immunities as citizens.]

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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, and which was granted by the legislature of that State.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else. 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 large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located.

The plaintiffs in error allege that the statute is a violation of the Constitution of the United States in these several particulars: That it creates an involuntary servitude forbidden by the thirteenth article of amendment; That it abridges the privileges and immunities of citizens of the United States; That it denies to the plaintiffs the equal protection of the laws; and, That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles. We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

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

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict.

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

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.

The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

[*Fourteenth Amendment*]: [N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

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

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

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy.

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

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

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

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

[T]he entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws

in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them. Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

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But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which 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. 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.” But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

[*Due process*]: 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. We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. 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.

[*Equal protection*]: “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.

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. 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.

Justice FIELD, dissenting:

The first clause of the fourteenth amendment recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. 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.

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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.

The *Slaughter-House Cases* narrowly interpreted each part of section one of the Fourteenth Amendment. The Supreme Court's narrow interpretation of the Due Process Clause was overruled relatively quickly. The Court rejected the application of the Due

Process Clause to protect a right to practice one's trade, with its declaration, without elaboration or explanation, that "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." Yet, as presented in Chapter 6, by the late nineteenth century and in the first third of the twentieth century, the Court found that the Due Process Clause did protect a right to practice a person's trade or profession. As presented in Chapter 8, throughout the twentieth century the Court has used the Due Process Clause to safeguard privacy and autonomy rights such as the right to marry, the right to custody of one's children, the right to purchase and use contraceptives, and the right to abortion.

The Court's narrow interpretation of the Equal Protection Clause lasted until well into the twentieth century. The Court said that the Equal Protection Clause only was meant to protect blacks and offered the prediction that "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." This prediction obviously proved false, and the Equal Protection Clause has been applied to prevent discrimination based on characteristics such as gender, alienage, and legitimacy.

However, the Supreme Court's extremely narrow interpretation of the Privileges or Immunities Clause lasted until very recently. The Court's declaration that the Privileges or Immunities Clause was not meant to provide a basis for invalidating state and local laws precluded the use of that provision to apply the Bill of Rights to the states. Indeed, the Court was explicit that "privileges and immunities . . . are left to the State governments for security and protection, and not by this article placed under the special care of the federal government." This means that the Privileges or Immunities Clause is removed as a basis for applying the Bill of Rights to the states or for protecting any rights from state interference.

Professor Corwin remarked that "[u]nique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a practical nullity by a single decision of the Supreme Court rendered within five years after its ratification."[9] Until 1999, only once in the 130 years since the ratification of the Fourteenth Amendment has a law been declared unconstitutional as violating the Privileges or Immunities Clause, and that case was overruled five years later.[10]

Interestingly, many scholars, including prominent conservatives, such as Clarence Thomas (prior to being appointed to the Supreme Court), have urged a resurrection of the Privileges or Immunities Clause.[11] The words of the clause suggest that it clearly protects rights—those that can be deemed privileges or immunities of citizenship—from state interference.

In 1999, for essentially the first time in American history, the Supreme Court used the Privileges or Immunities Clause to invalidate a state law.[12]

SAENZ v. ROE

Justice STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence.

What is at issue in this case is the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth 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. . . ."

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

These classifications may not be justified by a purpose to deter welfare applicants from migrating to California. First, although it is reasonable to assume that some persons may be motivated to move for the purpose of obtaining higher benefits, the empirical evidence reviewed by the District Judge, which takes into account the high cost of living in California, indicates that the number of such persons is quite small—surely not large enough to justify a burden on those who had no such motive. Second, California has represented to the Court that the legislation was not enacted for any such reason.

Chief Justice REHNQUIST, with whom Justice THOMAS joins, dissenting.

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, Colgate v. Harvey (1935), overruled five years later by Madden v. Kentucky (1940). It uses this Clause to strike down what I believe is a reasonable measure falling under the head of a "good-faith residency requirement." Because I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent.

Justice THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

I write separately to address the majority's conclusion that California has violated "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." In my view, the majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.

[I]t comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because the *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence.

Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court." Moore v. East Cleveland (1977).

3. The Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment

Because of the *Slaughter-House Cases*, the application of the Bill of Rights to the states could not be through the Privileges or Immunities Clause. In the early twentieth century, the Supreme Court suggested an alternate approach: finding that at least some of the Bill of Rights provisions are part of the liberty protected from state interference by the Due Process Clause of the Fourteenth Amendment.

In 1897, in Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897), the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment prevents states from taking property without just compensation. Although

the Court did not speak explicitly of the Fourteenth Amendment incorporating the Takings Clause, that was the practical effect of the decision.

In Twining v. New Jersey, 211 U.S. 78 (1908), the Supreme Court first expressly discussed applying the Bill of Rights to the states through the process of finding a right to be "incorporated" into the Due Process Clause of the Fourteenth Amendment. *Twining* involved whether a jury in state court could be instructed that it could draw a negative inference against a criminal defendant who did not testify. The Court had previously ruled that this violated the Fifth Amendment's privilege against self-incrimination. The issue was whether this right applied in state court.

The Supreme Court held that it did not (something later reversed), but the Court said that "it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

The Court then considered how to determine whether a right is included in due process of law: "What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

The Court concluded that the privilege against self-incrimination was not incorporated into due process (a holding that was later reversed): "We inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property."

Twining expressly opened the door to the Supreme Court applying provisions of the Bill of Rights to the states by finding them to be included—-incorporated—into the Due Process Clause of the Fourteenth Amendment. Soon the Court began to use this door. In Gitlow v. New York, 268 U.S. 652 (1925), the Court for the first time said that the First Amendment's protection of freedom of speech applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment. The Court declared, "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States." In *Gitlow*, the Court actually rejected the constitutional challenge to a state law that made it a crime to advocate the violent overthrow of government by force or violence. Two years later, in

Fiske v. Kansas, 274 U.S. 380 (1927), the Court for the first time found that a state law regulating speech violated the Due Process Clause of the Fourteenth Amendment.

In 1933, in Powell v. Alabama, 287 U.S. 45 (1932), the Court found that a state's denial of counsel in a capital case denied due process, thereby in essence applying the Sixth Amendment to the states in capital cases. The infamous Scottsboro trial involved two African American men who were convicted of rape without the assistance of an attorney at trial and with a jury from which all blacks had been excluded. The Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment protects fundamental rights from state interference and that this can include Bill of Rights provisions. But the Court said that "[i]f this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the 'conception of due process of law.'" The Court held that in a capital case, "it [is] clear that the right to the aid of counsel is of this fundamental character."

THE DEBATE OVER INCORPORATION

Once the Court found that the Due Process Clause of the Fourteenth Amendment protected fundamental rights from state infringement, there was a major debate over which liberties are safeguarded. For many years, this debate raged among justices and commentators. On the one side, there were the total incorporationists who believed that all of the Bill of Rights should be deemed to be included in the Due Process Clause of the Fourteenth Amendment. Justices Black and Douglas were the foremost advocates of this position.[13]

On the other side, there were the selective incorporationists who believed that only some of the Bill of Rights were sufficiently fundamental to apply to state and local governments. Justice Cardozo, for example, wrote that "[t]he process of absorption . . . [applied to rights where] neither liberty nor justice would exist if they were sacrificed."[14] Justice Cardozo said that the Due Process Clause included "principles of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and that were therefore "implicit in the concept of ordered liberty."[15] Justice Frankfurter said that due process precludes those practices that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."[16]

The debate between total and selective incorporation was obviously extremely important because it determined the reach of the Bill of Rights and the extent to which individuals could turn to the federal courts for protection from state and local governments. The following two cases were particularly important in that debate.

PALKO v. CONNECTICUT, 302 U.S. 319 (1937): Justice Cardozo delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the States, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the people of a state.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule. The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. Hurtado v. California (1884). This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.

The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.

Is [allowing the State to appeal the] kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." There is here no seismic innovation. The edifice of justice stands. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

ADAMSON v. CALIFORNIA, 332 U.S. 46 (1947): Justice Reed delivered the opinion of the Court.

The appellant, Adamson, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree. The provisions of California law permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury. The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of §1 of the Fourteenth Amendment.

It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights. The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states.

[A]ppellant argues, the Due Process Clause of the Fourteenth Amendment protects his privilege against self-incrimination. The Due Process Clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut. Specifically, the Due Process Clause does not protect, by virtue of its mere existence the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. Twining v. New Jersey. For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial.

The Due Process Clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process. California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the Due Process Clause, but to the constitutionality of the provision of the California law that permits comment upon his failure to testify.

The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.

Justice FRANKFURTER (concurring).

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States.

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War.

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.

Justice BLACK, dissenting.

The appellant was tried for murder in a California state court. He did not take the stand as a witness in his own behalf. The prosecuting attorney, under purported authority of a California statute, argued to the jury that an inference of guilt could be drawn because of appellant's failure to deny evidence offered against him. The appellant's contention in the state court and here has been that the statute denies him a right guaranteed by the Federal Constitution.

The first 10 amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments—Legislative, Executive, and Judicial.

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.[17]

The debate over incorporation centered primarily on three issues. First, the debate was over history and whether the framers of the Fourteenth Amendment intended it to apply the Bill of Rights to the states. Both sides of the debate claimed that history supported their view.

Second, the incorporation debate was over federalism. Applying the Bill of Rights to the states imposes a substantial set of restrictions on state and local governments. Not surprisingly, opponents of total incorporation argued based on federalism: the desirability of preserving state and local governing autonomy by freeing state and local governments from application of the Bill of Rights. Defenders of total incorporation responded that federalism is not a sufficient reason for tolerating violations of fundamental liberties.

Third, the debate was over the appropriate judicial role. In contrast, advocates of selective incorporation denied that this allowed subjective choices by justices. They maintained that total incorporation would mean more judicial oversight of state and local actions and thus less room for democracy to operate.

THE CURRENT LAW AS TO WHAT'S INCORPORATED

The selective incorporationists prevailed in this debate in that the Supreme Court never has accepted the total incorporationist approach. However, from a practical perspective, the total incorporationists largely succeeded in their objective because, one by one, the Supreme Court found almost all of the provisions to be incorporated.

For example, in Duncan v. Louisiana, 391 U.S. 145 (1968), held that the Sixth Amendment right to trial by jury applies to the states. Justice Byron White wrote for the Court and summarized the development of the law:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State, Chicago, B. & Q.R. Co. v. City of Chicago (1897); the rights of speech, press, and religion covered by the First Amendment, see, e.g., Fiske v. State of Kansas (1927); the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized, Mapp v. State of Ohio (1961); the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination, Malloy v. Hogan (1964); and the Sixth Amendment rights to counsel, Gideon v. Wainwright (1963); to a speedy, Klopfer v. State of North Carolina (1967), and public trial, In re Oliver (1948); to confrontation of opposing witnesses, Pointer v. State of Texas (1965); and to compulsory process for obtaining witnesses, Washington v. State of Texas (1967).

> The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Powell v. State of Alabama, (1932); whether it is "basic in our system of jurisprudence," In re Oliver (1948); and whether it is "a fundamental right, essential to a fair trial," Gideon v. Wainwright (1963).
>
> The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Justice Black wrote a concurring opinion joined by Justice Douglas, reiterated his view of total incorporation:

> My view has been and is that the Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause. I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way.

In the last decade, the Court has twice considered incorporation. In McDonald v. City of Chicago (2010), the Court considered the incorporation of the Second Amendment. And

in Timbs v. Indiana (2019), the Court considered the incorporation of the excessive fines clause of the Eighth Amendment.

In District of Columbia v. Heller (2008) (presented in Chapter 1), the Supreme Court held that the Second Amendment is not limited to protecting a right to have firearms for militia service; it protects an individual's right to have guns, at least for self-protection in the home. Because the District of Columbia is a part of the federal government, the Court had no occasion to consider whether the Second Amendment applies to state and local governments. In *McDonald*, the Court addressed this and held five to four that the Second Amendment applies to state and local governments. Justice Alito, writing for a plurality of four, used incorporation into the Due Process Clause to accomplish this. Justice Thomas, concurring and concurring in the judgment, would have used the Privileges or Immunities Clause of the Fourteenth Amendment.

MCDONALD v. CITY OF CHICAGO

561 U.S. 742 (2010)

Justice ALITO announced the judgment of the Court

Two years ago, in District of Columbia v. Heller (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

[I]

Petitioners argue that we should overrule [earlier] decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others, but petitioners are unable to identify the Clause's full scope. Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed.

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

[The Court then reviewed the history of incorporation in detail.]

[II]

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

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is "the *central component*" of the Second Amendment right. Explaining that "the need for defense of self, family, and property is most acute" in the home, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense."

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." Blackstone's assessment was shared by the American colonists. As we noted in *Heller*, King George III's attempt to disarm the colonists in the 1760's and 1770's "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights.

This understanding persisted in the years immediately following the ratification of the Bill of Rights. In addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820.

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. The laws of some States formally prohibited African Americans from possessing firearms. Union Army commanders took steps to secure the right of all citizens to keep and bear arms, but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental. The Civil Rights Act of 1866, which was considered at the same time as the Freedmen's Bureau Act, sought to protect the right of all citizens to keep and bear arms.

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safeguards of liberty under our form of Government." One of these, he said, was the right to keep and bear arms. Even those who thought the Fourteenth Amendment unnecessary believed that blacks, as citizens, "have equal right to protection, and to keep and bear arms for self-defense." Evidence from the period

immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

[III]

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

Municipal respondents submit that the Due Process Clause protects only those rights "recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice." According to municipal respondents, if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.

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

In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

Justice SCALIA, concurring.

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

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

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

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

The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point.

To be sure, the plurality's effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives. But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

I cannot accept a theory of constitutional interpretation that rests on such tenuous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. Moreover, as judges, we interpret the Constitution one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. With the inquiry appropriately

narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.

I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.

Justice STEVENS, dissenting.

In District of Columbia v. Heller (2008), the Court answered the question whether a federal enclave's "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the home." That is a different—and more difficult—inquiry than asking if the Fourteenth Amendment "incorporates" the Second Amendment. The so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century.

I agree with the plurality's refusal to accept petitioners' primary submission. Their briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases* (1873). But the original meaning of the Clause is not as clear as they suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent. The burden is severe for those who seek radical change in such an established body of constitutional doctrine. Moreover, the suggestion that invigorating the Privileges or Immunities Clause will reduce judicial discretion, strikes me as implausible, if not exactly backwards. "For the very reason that it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution."

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

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is

far from hypothetical, for gun crime has devastated many of our communities. *Amici* calculate that approximately one million Americans have been wounded or killed by gunfire in the last decade. Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide.

Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day—assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

Second, the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. Despite the plethora of substantive due process cases that have been decided in the post-*Lochner* century, I have found none that holds, states, or even suggests that the term "liberty" encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither petitioners nor their *amici* make such a contention.

Third, the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation. That the United States is an international outlier in the permissiveness of its approach to guns does not suggest that our laws are bad laws. It does suggest that this Court may not need to assume responsibility for making our laws still more permissive.

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

Furthermore, and critically, the Court's imposition of a national standard is still more unwise because the elected branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms. The strength of a liberty claim must be assessed in connection with its status in the democratic process. And in this case, no one disputes "that opponents of [gun] control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process," or that "the widespread commitment to an individual right to own guns . . . operates as a safeguard against excessive or unjustified gun control laws." Indeed, there is a good deal of evidence to suggest that, if anything, American lawmakers tend to *under* regulate guns, relative to the policy views expressed by majorities in opinion polls. If a particular State or locality has enacted some "improvident" gun-control measures, as petitioners believe Chicago has done, there is no apparent reason to infer that the mistake will not "eventually be rectified by the democratic process."

TIMBS v. INDIANA

139 S. Ct. 682 (2019)

Justice GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed.

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement. . . ." As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood."

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions.

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines. Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money."

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."

Justice THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the

"privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

After *McDonald* and *Timbs*, there are still three provisions of the Bill of Rights that never have been incorporated and do not apply to state and local governments. First, the Third Amendment right to not have soldiers quartered in a person's home never has been deemed incorporated. The reason almost certainly is that a Third Amendment case presenting the incorporation question never has reached the Supreme Court. If ever such a case would arise, the Supreme Court surely would find this provision applies to the states.[18]

Second, the Court has held that the Fifth Amendment's right to a grand jury indictment in criminal cases is not incorporated.[19] Thus, states need not use grand juries and can choose alternatives such as preliminary hearings and prosecutorial informations.

Third, the Court has ruled that the Seventh Amendment right to jury trial in civil cases is not incorporated.[20] States therefore can eliminate juries in some or even all civil suits without violating the United States Constitution.

The remainder of the Bill of Rights, as detailed above, has been deemed incorporated. Technically, the Bill of Rights still applies directly only to the federal government; Barron v. Mayor & City Council of Baltimore never has been expressly overruled. Therefore, whenever a case involves a state or local violation of a Bill of Rights provision, to be precise, it involves that provision as applied to the states through the Due Process Clause of the Fourteenth Amendment.

THE CONTENT OF INCORPORATED RIGHTS

If a provision of the Bill of Rights applies to the states, is its content identical as to when it is applied to the federal government? Or as it is sometimes phrased, does the Bill of Rights provision apply "jot for jot"?[21]

The Supreme Court has not consistently answered these questions. In some cases, the Court has expressly stated that the Bill of Rights provision applied in exactly the same manner whether it is a federal or a state government action. For example, the Supreme Court has declared that it is "firmly embedded in our constitutional jurisprudence . . . that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."[22] Similarly, the Court has said that "the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[23] The Court said that it "rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[24]

However, in other instances, the Court has ruled that some Bill of Rights provisions apply differently to the states than to the federal government. In Williams v. Florida, 399

U.S. 78 (1970), the Supreme Court held that states need not use 12-person juries in criminal cases, even though that is the practice for federal trials. The Court upheld the constitutionality of six-person juries in state criminal trials and explained that the jury of 12 was "a historical accident, unnecessary to effect the purposes of the jury system."

In Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972), the Supreme Court held that states may allow non-unanimous jury verdicts in criminal cases. Although the Sixth Amendment has been interpreted to require unanimous juries in federal criminal trials, the Supreme Court ruled that states may allow convictions based on 11-1 or 10-2 jury votes. However, the Court has ruled that conviction by a nonunanimous six-person jury violates due process.[25] In Ramos v. Louisiana, in October Term 2019, the Court will reconsider these decisions and whether incorporation includes a right to a unanimous jury verdict when there is a 12-person jury.

From a practical perspective, except for the requirements of a 12-person jury and a unanimous verdict, the Bill of Rights provisions that have been incorporated apply to the states exactly as they apply to the federal government. This might be criticized on federalism grounds as unduly limiting the states. But rights such as freedom of speech are fundamental liberties and there is no reason why their content should vary depending on the level of government.

Although the debate over incorporation raged among Justices and scholars during the 1940s, 1950s, and 1960s, now the issue seems settled. Except for the few provisions mentioned above, the Bill of Rights provisions do apply to state and local governments and, in almost all instances, with the same content regardless of whether the challenge is a challenge to federal, state, or local actions.

C. THE APPLICATION OF THE BILL OF RIGHTS AND THE CONSTITUTION TO PRIVATE CONDUCT

1. The Requirement for State Action

The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not have to comply with the Constitution. This is often referred to as the "state action" doctrine, although "state action" is something of a misnomer. The Constitution applies to government at all levels, federal, state, and local, and to the actions of government officers at all levels. The Constitution, however, generally does not apply to private entities or actors. The following decision—the *Civil Rights Cases*—is generally regarded as the initial articulation of the state action doctrine.

THE CIVIL RIGHTS CASES: UNITED STATES v. STANLEY

109 U.S. 3 (1883)

BRADLEY, J.

These cases are all founded on the first and second sections of the act of congress known as the "Civil Rights Act," passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights." The sections of the law referred to provide as follows:

> Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
>
> Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year.

Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude."

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The first section of the fourteenth amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.

[T]he 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.

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, for the prohibitions of the amendment are against state laws and acts done under state authority.

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 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. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities. If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop.

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 blanket rule that the Constitution only applies to the government must be qualified in a few respects. First, the Thirteenth Amendment to the Constitution is the one provision that directly regulates private conduct. Section 1 of the Thirteenth Amendment states, “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." In other words, the Thirteenth Amendment forbids people from being or owning slaves. For example, the Supreme Court has said that the Thirteenth Amendment forbids compelling a person to work for another individual to repay a debt.[26]

Second, statutes, both federal and state, can apply constitutional norms to private conduct. The state action doctrine provides that the Constitution only applies to the government. But the government can enact laws that require that private conduct meet the same standards that the Constitution requires of the government. For example, the constitutional requirement for equal protection applies just to the government. Congress, however, has enacted laws, such as the Civil Rights Act of 1964, that prohibit private discrimination by private employers and by places of public accommodation.[27] Another illustration is a California law that requires that private schools and universities provide the same protection of speech that students would receive at a public school or university.[28] Actions, of course, are brought directly under such statutes and are governed by the terms of the laws; the Constitution still does not apply.

Finally, there are exceptions to the state action requirement; situations where private conduct has to comply with the Constitution. These exceptions are presented in detail below.

In evaluating the Supreme Court cases below that concern the exceptions to the state action doctrine, it is important to consider the costs and benefits of having such a rule. Obviously, those who believe that the disadvantages of the state action doctrine outweigh its advantages want broad exceptions to the doctrine and those who think the reverse want very narrow exceptions.

There are serious costs to the state action requirement: Absent statutory restrictions, private conduct can infringe or trample even the most basic rights. Freedom of speech, privacy, and equality—this society's most cherished values—can be violated without any redress in the courts. Private infringements of basic freedoms can be just as harmful as government violations. Speech can be lost or chilled just as much through private sanctions as through public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government actions.

On the other hand, the state action doctrine is defended as desirable on the grounds that it preserves a zone of private autonomy and that it advances federalism. The Supreme Court has explained that the state action requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[29] The state action doctrine means that private actors have the freedom to ignore the Constitution and the limits contained within it. A vast array of private actions might be constrained and challenged in the courts if there were not a state action requirement for the application of the Constitution.

Also, the Supreme Court says that the state action doctrine enhances federalism by preserving a zone of state sovereignty.[30] The *Civil Rights Cases* held that federal constitutional rights do not govern individual behavior and, furthermore, that Congress lacks the authority to apply them to private conduct.[31] Structuring the legal relationships of private citizens was for the state, not for the national government.

In considering the exceptions to the state action doctrine, it is important to consider these competing policy considerations in evaluating whether the Court has properly defined the exceptions or whether they are too broad or too narrow.

2. The Exceptions to the State Action Doctrine

There are two exceptions to the state action doctrine; that is, situations where private conduct must comply with the Constitution. One is the "public functions exception," which says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government. The other is the "entanglement exception," which says that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.

At the outset in examining the exceptions to the state action doctrine it must be recognized that the cases do not neatly fit together. Some of the decisions seem clearly inconsistent with one another and the Court often has made little effort to reconcile them. Cases concerning these exceptions have been called a "conceptual disaster area"[32] and even the Supreme Court has admitted that the "cases deciding when private action might be deemed that of the state have not been a model of consistency."[33]

There are several explanations for this inconsistency. In part, it reflects inherent problems with state action; the government always has the power to regulate private behavior and there never can be a clear line for when the failure to do so constitutes state action and a constitutional violation. Likewise, the government is involved, to some extent, in almost every activity. It is difficult, if not impossible, to draw a meaningful line as to the point where the involvement is great enough to require the private action to comply with the Constitution.

The inconsistencies also reflect the way in which some of the state action decisions were written and decided. As explained below, cases with regard to both of the exceptions articulated broad principles that could make a wide range of private conduct actionable under the Constitution. Because those cases have not been overruled, but also not always followed, there is tension among the decisions.

The inconsistencies also reflect social realities. From the late 1940s through the 1960s, the Court expansively defined what constitutes state action as part of trying to combat racial discrimination. These decisions understandably articulated broad principles that could make a great deal of private conduct reviewable under the Constitution. Since the 1960s, especially in cases involving other constitutional provisions, the Court has applied a much narrower definition of state action. There are inconsistencies among the cases that the Court never has acknowledged or resolved.

In fact, a review of the decisions indicates that the Court has been much more likely to apply the exceptions in cases involving race discrimination than in cases involving other constitutional claims. Indeed, the United States Court of Appeals for the Second Circuit expressly held that the scope of the exceptions to the state action doctrine turns on whether it is a claim of race discrimination or another constitutional right.[34] Yet this distinction seems difficult to defend. State action is about whether the Constitution

should apply because of the government's involvement or because the act is one that is traditionally governmental in nature. It is unclear why this inquiry depends at all on the particulars of the constitutional claim.

The inconsistency among the cases also reflects the reduced need to rely on the Constitution to reach private racial discrimination. The adoption of the Civil Rights Act of 1964, which prohibited private discrimination by places of public accommodation and private employers, greatly lessened the need for constitutional litigation to end discrimination. For example, prior to the 1964 Civil Rights Act, the Court had to consider whether there was state action when the government leased premises to a restaurant that racially discriminated.[35] But after the 1964 Civil Rights Act, the state action inquiry would have been unnecessary because the law prohibited the restaurant from racially discriminating even if there was no government involvement.

The two exceptions—the public functions exception and the entanglement exception—are discussed, in turn, below. It should be noted that many cases involve discussion of both exceptions and therefore are considered below under each of the exceptions. Also, in some cases, the Court is not clear as to which exception it is discussing. This, too, contributes to the doctrinal confusion concerning the state action doctrine.

a. The Public Functions Exception

There is a sharp contrast between how the Court defined the public functions exception in the following two cases: Marsh v. Alabama and Jackson v. Metropolitan Edison Co. *Marsh* is expansive in its definition and could be used to find a great deal of private conduct to be state action. *Jackson* is quite narrow and makes it very difficult to find that private actors are performing a public function. After these contrasting cases, two important areas where the Court has considered the public functions exception are presented: elections and private property used for public purposes.

MARSH v. ALABAMA

326 U.S. 501 (1946)

Justice BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town.

The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The

town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted.

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. Under our decision[s], neither a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places.

Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that

the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.

JACKSON v. METROPOLITAN EDISON CO.

419 U.S. 345 (1974)

Justice REHNQUIST delivered the opinion of the Court.

Respondent Metropolitan Edison Co. is a privately owned and operated Pennsylvania corporation which holds a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area which includes the city of York, Pa. As a condition of holding its certificate, it is subject to extensive regulation by the Commission. Under a provision of its general tariff filed with the Commission, it has the right to discontinue service to any customer on reasonable notice of nonpayment of bills.

Petitioner Catherine Jackson is a resident of York, who has received electricity in the past from respondent. Until September 1970, petitioner received electric service to her home in York under an account with respondent in her own name. When her account was terminated because of asserted delinquency in payments due for service, a new account with respondent was opened in the name of one James Dodson, another occupant of the residence, and service to the residence was resumed. There is a dispute

as to whether payments due under the Dodson account for services provided during this period were ever made. In August 1971, Dodson left the residence. Service continued thereafter but concededly no payments were made. Petitioner states that no bills were received during this period.

On October 6, 1971, employees of Metropolitan came to the residence and inquired as to Dodson's present address. Petitioner stated that it was unknown to her. On the following day, another employee visited the residence and informed petitioner that the meter had been tampered with so as not to register amounts used. She disclaimed knowledge of this and requested that the service account for her home be shifted from Dodson's name to that of Robert Jackson, later identified as her 12-year-old son. Four days later on October 11, 1971, without further notice to petitioner, Metropolitan employees disconnected her service.

Mrs. Jackson argues that under the Due Process Clause of the Fourteenth Amendment she cannot be deprived of this entitlement to utility service without adequate notice and a hearing before an impartial body: until these are completed, her service must continue. The Due Process Clause of the Fourteenth Amendment provides: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the Civil Rights Cases (1883) affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield.

While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is "private," on the one hand, or "state action," on the other, frequently admits of no easy answer.

Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Petitioner first argues that "state action" is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment.

Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by [Pennsylvania law] and hence performs a "public function." We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. *See*, *e.g.*, Nixon v. Condon (1932) (election); Terry v. Adams (1953) (election); Marsh v. Alabama (1946) (company town); Evans v. Newton (1966) (municipal park). If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions. We decline the invitation. Doctors, optometrists, lawyers, and grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment.

Justice MARSHALL, dissenting.

The Metropolitan Edison Co. provides an essential public service to the people of York, Pa. It is the only entity, public or private, that is authorized to supply electric service to most of the community. As a part of its charter to the company, the State imposes extensive regulations, and it cooperates with the company in myriad ways. Additionally, the State has granted its approval to the company's mode of service termination—the very conduct that is challenged here. Taking these factors together, I have no difficulty finding state action in this case. As the Court concluded in Burton v. Wilmington Parking Authority (1961), the State has sufficiently "insinuated itself into a position of interdependence with (the company) that it must be recognized as a joint participant in the challenged activity."

Our state-action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the

"private" entity and the State; and a service uniquely public in nature. Today the Court takes a major step in repudiating this line of authority and adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations.

I disagree with the majority's position on three separate grounds. First, the suggestion that the State would have to "put its own weight on the side of the proposed practice by ordering it" seems to me to mark a sharp departure from our previous state-action cases. [W]e have consistently indicated that state authorization and approval of "private" conduct would support a finding of state action. Second, I question the wisdom of giving such short shrift to the extensive interaction between the company and the State, and focusing solely on the extent of state support for the particular activity under challenge. Finally, it seems to me in any event that the State has given its approval to Metropolitan Edison's termination procedures. The State Utility Commission approved a tariff provision under which the company reserved the right to discontinue its service on reasonable notice for nonpayment of bills.

The fact that the Metropolitan Edison Co. supplies an essential public service that is in many communities supplied by the government weighs more heavily for me than for the majority. The Court concedes that state action might be present if the activity in question were "traditionally associated with sovereignty," but it then undercuts that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the "public function" argument too narrowly. The whole point of the "public function" cases is to look behind the State's decision to provide public services through private parties. In my view, utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a "public function."

Marsh and *Jackson* use very different tests for the public function test. *Marsh* uses a balancing test and looks to whether the private property is used for a public purpose. *Jackson* focuses on whether it is an activity that has been traditionally, exclusively done by the government. Cases involving three different areas in which the Court has applied the public functions test follow: one dealing with elections (Terry v. Adams), one dealing with private property used for public purposes (Evans v. Newton), and one dealing with a public access cable channel. In examining these cases, consider the approach to the public functions doctrine used in each.

TERRY v. ADAMS

345 U.S. 461 (1953)

Mr. Justice BLACK announced the judgment of the Court.

In Smith v. Allwright (1944), we held that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the Fifteenth Amendment. This case raises questions concerning the constitutional power of a Texas county political organization called the Jaybird Democratic Association or Jaybird Party to exclude Negroes from its primaries on racial grounds. The Jaybirds deny that their racial exclusions violate the Fifteenth Amendment. They contend that the Amendment

applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club.

The Jaybird Association or Party was organized in 1889. Its membership was then and always has been limited to white people; they are automatically members if their names appear on the official list of county voters. It has been run like other political parties with an executive committee named from the county's voting precincts. Expenses of the party are paid by the assessment of candidates for office in its primaries. Candidates for county offices submit their names to the Jaybird Committee in accordance with the normal practice followed by regular political parties all over the country. Advertisements and posters proclaim that these candidates are running subject to the action of the Jaybird primary. While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed. Thus the party has been the dominant political group in the county since organization, having endorsed every county-wide official elected since 1889.

It is apparent that Jaybird activities follow a plan purposefully designed to exclude Negroes from voting and at the same time to escape the Fifteenth Amendment's command that the right of citizens to vote shall neither be denied nor abridged on account of race. These were the admitted party purposes according to the testimony of the Jaybird's president.

The Fifteenth Amendment provides 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 Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local.

It is significant that precisely the same qualifications as those prescribed by Texas entitling electors to vote at county-operated primaries are adopted as the sole qualifications entitling electors to vote at the county-wide Jaybird primaries with a single proviso—Negroes are excluded. Everyone concedes that such a proviso in the county-operated primaries would be unconstitutional. The Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth Amendment seeks to prevent. When it produces the equivalent of the prohibited election, the damage has been done.

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.

The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.

EVANS v. NEWTON

382 U.S. 296 (1966)

Justice DOUGLAS delivered the opinion of the Court.

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee. Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied. Thereafter the city resigned as trustee and amended its answer accordingly.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear.

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. But a municipal golf course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral.

What is “private” action and what is “state” action is not always easy to determine. “Only by sifting facts and weighing circumstances” can we determine whether the reach of the Fourteenth Amendment extends to a particular case. The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.

If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered. This park, however, is in a different posture. For years it was an integral part of the City of Macon’s activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption. The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of “private” trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment. We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town in Marsh v. State of Alabama, and the elective process of Terry v. Adams, the predominant character and purpose of this park are municipal.

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.

MANHATTAN COMMUNITY ACCESS CORPORATION v. HALLECK

139 S. Ct. 1921 (2019)

Justice KAVANAUGH delivered the opinion of the Court.

The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co. (1974).

This state-action case concerns the public access channels on Time Warner's cable system in Manhattan. Public access channels are available for private citizens to use. The public access channels on Time Warner's cable system in Manhattan are operated by a private nonprofit corporation known as MNN. The question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels. In other words, is operation of public access channels on a cable system a traditional, exclusive public function? If so, then the First Amendment would restrict MNN's exercise of editorial discretion over the speech and speakers on the public access channels.

Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion.

I

Since the 1970s, public access channels have been a regular feature on cable television systems throughout the United States. In the 1970s, Federal Communications Commission regulations required certain cable operators to set aside channels on their cable systems for public access. In 1979, however, this Court ruled that the FCC lacked statutory authority to impose that mandate. A few years later, Congress passed and President Reagan signed the Cable Communications Policy Act of 1984. The Act authorized state and local governments to require cable operators to set aside channels on their cable systems for public access.

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The New York State Public Service Commission regulates cable franchising in New York State and requires cable operators in the State to set aside channels on their cable systems for public access. State law requires that use of the public access channels be free of charge and first-come, first-served. Under state law, the cable operator operates the public access channels unless the local government in the area chooses to itself operate the channels or designates a private entity to operate the channels.

Time Warner (now known as Charter) operates a cable system in Manhattan. Under state law, Time Warner must set aside some channels on its cable system for public access. New York City (the City) has designated a private nonprofit corporation named Manhattan Neighborhood Network, commonly referred to as MNN, to operate Time Warner's public access channels in Manhattan. This case involves a complaint against MNN regarding its management of the public access channels.

Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true. DeeDee Halleck and Jesus Papoleto Melendez produced public access programming in Manhattan. They made a film about MNN's alleged neglect of the East Harlem community. Halleck submitted the film to MNN for airing on MNN's public access channels, and MNN later televised the film. Afterwards, MNN fielded multiple complaints about the film's content. In response, MNN temporarily suspended Halleck from using the public access channels. Halleck and Melendez soon became embroiled in another dispute with MNN staff. In the wake of that dispute, MNN ultimately suspended Halleck and Melendez from all MNN services and facilities.

Halleck and Melendez then sued MNN, among other parties, in Federal District Court. The two producers claimed that MNN violated their First Amendment free-speech rights when MNN restricted their access to the public access channels because of the content of their film.

MNN moved to dismiss the producers' First Amendment claim on the ground that MNN is not a state actor and therefore is not subject to First Amendment restrictions on its editorial discretion.

II

The text and original meaning of [the First and Fourteenth] Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech. In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty.

Here, the producers claim that MNN, a private entity, restricted their access to MNN's public access channels because of the content of the producers' film. The producers have advanced a First Amendment claim against MNN. The threshold problem with that First Amendment claim is a fundamental one: MNN is a private entity.

Relying on this Court's state-action precedents, the producers assert that MNN is nonetheless a state actor subject to First Amendment constraints on its editorial discretion. Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.

The producers' primary argument here falls into the first category: The producers contend that MNN exercises a traditional, exclusive public function when it operates the public access channels on Time Warner's cable system in Manhattan. We disagree.

Under the Court's cases, a private entity may qualify as a state actor when it exercises "powers traditionally exclusively reserved to the State." It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function.

The Court has stressed that "very few" functions fall into that category. Under the Court's cases, those functions include, for example, running elections and operating a company town. The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity.

The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government.

Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries.

The history of public access channels in Manhattan further illustrates the point. In 1971, public access channels first started operating in Manhattan. Those early Manhattan public access channels were operated in large part by private cable operators, with some help from private nonprofit organizations. Those private cable operators continued to operate the public access channels until the early 1990s, when MNN (also a private entity) began to operate the public access channels.

In short, operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases.

Justice SOTOMAYOR, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, dissenting.

The Court tells a very reasonable story about a case that is not before us. I write to address the one that is. This is a case about an organization appointed by the government to administer a constitutional public forum. (It is not, as the Court suggests, about a private property owner that simply opened up its property to others.) New York City (the City) secured a property interest in public-access television channels when it granted a cable franchise to a cable company. State regulations require those public-access channels to be made open to the public on terms that render them a public

forum. The City contracted out the administration of that forum to a private organization, petitioner Manhattan Community Access Corporation (MNN). By accepting that agency relationship, MNN stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other.

I

A cable-television franchise is, essentially, a license to create a system for distributing cable TV in a certain area. It is a valuable right, usually conferred on a private company by a local government. A private company cannot enter a local cable market without one.

Cable companies transmit content through wires that stretch "between a transmission facility and the television sets of individual subscribers." Creating this network of wires is a disruptive undertaking that "entails the use of public rights-of-way and easements."

New York State authorizes municipalities to grant cable franchises to cable companies of a certain size only if those companies agree to set aside at least one public access channel. New York then requires that those public-access channels be open to all comers on "a first-come, first-served, nondiscriminatory basis." Likewise, the State prohibits both cable franchisees and local governments from "exercis[ing] any editorial control" over the channels, aside from regulating obscenity and other unprotected content.

II

I would affirm the judgment below. The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.

Here, respondents alleged viewpoint discrimination. So a key question in this case concerns what the Manhattan public-access channels are: a public forum of some kind, in which a claim alleging viewpoint discrimination would be cognizable, or something else, such as government speech or purely private property, where picking favored viewpoints is appropriately commonplace. Neither MNN nor the majority suggests that this is an instance of government speech. This case thus turns first and foremost on whether the public-access channels are or are not purely private property.

This Court has not defined precisely what kind of governmental property interest (if any) is necessary for a public forum to exist. I assume for the sake of argument in this case that public-forum analysis is inappropriate where the government lacks a "significant property interest consistent with the communicative purpose of the forum."

Such an interest is present here. As described above, New York State required the City to obtain public-access channels from Time Warner in exchange for awarding a cable

franchise. The exclusive right to use these channels (and, as necessary, Time Warner's infrastructure) qualifies as a property interest, akin at the very least to an easement.

As noted above, there is no disputing that Time Warner owns the wires themselves. If the wires were a road, it would be easy to define the public's right to walk on it as an easement. Similarly, if the wires were a theater, there would be no question that a government's long-term lease to use it would be sufficient for public-forum purposes. But some may find this case more complicated because the wires are not a road or a theater that one can physically occupy; they are a conduit for transmitting signals that appear as television channels. In other words, the question is how to understand the right to place content on those channels using those wires.

The right to convey expressive content using someone else's physical infrastructure is not new. To give another low-tech example, imagine that one company owns a billboard and another rents space on that billboard. The renter can have a property interest in placing content on the billboard for the lease term even though it does not own the billboard itself.

The same principle should operate in this higher tech realm. Just as if the channels were a billboard, the City obtained rights for exclusive use of the channels by the public for the foreseeable future; no one is free to take the channels away, short of a contract renegotiation. The City also obtained the right to administer, or delegate the administration of, the channels. The channels are more intangible than a billboard, but no one believes that a right must be tangible to qualify as a property interest. And it is hardly unprecedented for a government to receive a right to transmit something over a private entity's infrastructure in exchange for conferring something of value on that private entity; examples go back at least as far as the 1800s.

I do not suggest that the government always obtains a property interest in public-access channels created by franchise agreements. But the arrangement here is consistent with what the Court would treat as a governmental property interest in other contexts. New York City gave Time Warner the right to lay wires and sell cable TV. In exchange, the City received an exclusive right to send its own signal over Time Warner's infrastructure —no different than receiving a right to place ads on another's billboards. Those rights amount to a governmental property interest in the channels, and that property interest is clearly "consistent with the communicative purpose of the forum." Indeed, it is the right to transmit the very content to which New York law grants the public open and equal access.

III

More fundamentally, the majority's opinion erroneously fixates on a type of case that is not before us: one in which a private entity simply enters the marketplace and is then subject to government regulation. The majority swings hard at the wrong pitch. The majority focuses on Jackson v. Metropolitan Edison Co. (1974), which is a paradigmatic example of a line of cases that reject §1983 liability for private actors that simply operate against a regulatory backdrop.

The *Jackson* line of cases is inapposite here. MNN is not a private entity that simply ventured into the marketplace. It occupies its role because it was asked to do so by the

City, which secured the public-access channels in exchange for giving up public rights of way, opened those channels up (as required by the State) as a public forum, and then deputized MNN to administer them. That distinguishes MNN from a private entity that simply sets up shop against a regulatory backdrop. To say that MNN is nothing more than a private organization regulated by the government is like saying that a waiter at a restaurant is an independent food seller who just happens to be highly regulated by the restaurant's owners.

IV

This is not a case about bigger governments and smaller individuals; it is a case about principals and agents. New York City opened up a public forum on public-access channels in which it has a property interest. It asked MNN to run that public forum, and MNN accepted the job. That makes MNN subject to the First Amendment, just as if the City had decided to run the public forum itself.

While the majority emphasizes that its decision is narrow and factbound, that does not make it any less misguided. It is crucial that the Court does not continue to ignore the reality, fully recognized by our precedents, that private actors who have been delegated constitutional responsibilities like this one should be accountable to the Constitution's demands.

The Supreme Court also has considered the application of the public function doctrine in deciding whether there is a First Amendment right to use privately owned shopping centers for speech purposes. The Court initially analogized shopping centers to the company town in Marsh v. Alabama and concluded that there is a First Amendment right of access. The Court then qualified this right and finally it overturned its initial ruling and held that there is no First Amendment right to use private shopping centers for speech purposes.

In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), the Supreme Court held that a privately owned shopping center could not exclude striking laborers from picketing a store within it. The Court expressly analogized to *Marsh* and said that "[t]he similarities between the business block in *Marsh* and the shopping center . . . are striking. . . . The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*." The Court emphasized that the shopping center was open to the public and functionally was the same as the commercial center of a town.

Just four years later, in Lloyd Corp. v. Tanner, 391 U.S. 308 (1968), the Supreme Court held that a privately owned shopping center could exclude anti–Vietnam War protestors from distributing literature on its premises. The Court distinguished *Logan Valley* on the ground that it involved a labor protest related to the functioning of a store in the shopping center, whereas the speech in *Lloyd* was an antiwar protest unrelated to the conduct of the business.

Although there is a common-sense basis for this distinction, constitutionally it is difficult to defend. The Supreme Court long has held that the core of the First Amendment is that the government cannot regulate speech based on its content. Yet *Lloyd* makes the

content of the speech decisive in determining whether it will be allowed. Under *Lloyd,* speech in shopping centers is constitutionally protected and can be the basis for a trespassing conviction only if its content concerns the functioning of the shopping centers. Also, it is difficult to explain why the determination of whether a private shopping center is a state actor for First Amendment purposes should turn on the message being expressed.

HUDGENS v. NATIONAL LABOR RELATIONS BOARD

424 U.S. 507 (1976)

Justice STEWART delivered the opinion of the Court.

A group of labor union members who engaged in peaceful primary picketing within the confines of a privately owned shopping center were threatened by an agent of the owner with arrest for criminal trespass if they did not depart. The petitioner, Scott Hudgens, is the owner of the North DeKalb Shopping Center, located in suburban Atlanta, Ga. The center consists of a single large building with an enclosed mall. Surrounding the building is a parking area which can accommodate 2,640 automobiles. The shopping center houses 60 retail stores leased to various businesses. One of the lessees is the Butler Shoe Co. Most of the stores, including Butler's, can be entered only from the interior mall.

In January 1971, warehouse employees of the Butler Shoe Co. went on strike to protest the company's failure to agree to demands made by their union in contract negotiations. The strikers decided to picket not only Butler's warehouse but its nine retail stores in the Atlanta area as well, including the store in the North DeKalb Shopping Center. On January 22, 1971, four of the striking warehouse employees entered the center's enclosed mall carrying placards which read: "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." The general manager of the shopping center informed the employees that they could not picket within the mall or on the parking lot and threatened them with arrest if they did not leave. The employees departed but returned a short time later and began picketing in an area of the mall immediately adjacent to the entrances of the Butler store. After the picketing had continued for approximately 30 minutes, the shopping center manager again informed the pickets that if they did not leave they would be arrested for trespassing. The pickets departed.

It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself. This elementary proposition is little more than a truism.

It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale

of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. [T]he ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley.*

If a large self-contained shopping center is the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities, what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. "[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 Dept. of Chicago v. Mosley. It conversely follows, therefore, that if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co. We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.

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b. The Entanglement Exception

The other major exception to the state action doctrine is termed the "entanglement exception." Under this exception, the Constitution applies if the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution. Either the government must cease its involvement with the private actor or the private entity must comply with the Constitution.

The key question, then, is what degree of government involvement is sufficient to make the Constitution applicable? What types of government encouragement are sufficient for state action? Unfortunately, the entanglement exception cases are even more inconsistent than those concerning the public function exception.

The entanglement exception cases have arisen primarily in four areas: judicial and law enforcement actions, government licensing and regulation, government subsidies, and voter initiatives permitting discrimination. These categories are admittedly arbitrary in that many cases involve all or most of these government activities, just as cases often involve both the public functions and the entanglement exception. Nonetheless, the categories at least provide useful groupings for considering the cases.

JUDICIAL AND LAW ENFORCEMENT ACTIONS

SHELLEY v. KRAEMER

334 U.S. 1 (1948)

Chief Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color.

On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part: . . . "the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [sic] not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase. On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct.

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. It is clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance.

But the present cases do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment.

That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Commonwealth of Virginia v. Rives (1880) this Court stated: “It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.” Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided.

But the examples of state judicial action which have been held by this Court to violate the Amendment’s commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment’s prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure. We have no doubt

that there has been state action in these cases in the full and complete sense of the phrase.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing. We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

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Although *Shelley* long has been controversial, there seems little doubt that judges are government actors and that judicial remedies are state action. It was also not controversial when the Supreme Court held in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 15 years after *Shelley*, that the common law of libel is state action that must comply with the First Amendment.[36] The Court said that although the defamation action was a "civil lawsuit between private parties, the Alabama courts have applied a state rule of law which [allegedly] . . . impose[s] invalid restrictions on their constitutional freedoms. . . . It matters not that the law has been applied in a civil action and that it is common law only. . . . 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."

From this perspective, *Shelley* seems unremarkable: A branch of the government, the judiciary, was enforcing the law of the state, albeit the common law, to enforce racial discrimination by enforcing the discriminatory covenants.

Yet *Shelley* remains controversial because ultimately everything can be made state action under it. If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution. Anyone who believes that his or her rights have been violated can sue in state court. If the court dismisses the case because the state law does not forbid the violation, there is state action sustaining the infringement of the right, just as there would have been state action had the court dismissed the case in *Shelley.* All private violations of rights exist because state law allows them. It is difficult to imagine anything that cannot potentially be transformed into state action under this reasoning.

The Court, of course, never has taken *Shelley* this far; nor has it articulated any clear limiting principles. In fact, the Court only rarely has applied *Shelley* as a basis for finding state action.[37] There are two major areas in which the Court has considered judicial enforcement as state action: use of courts for prejudgment attachment and the use of peremptory challenges at trials.

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Example: Prejudgment Attachment

LUGAR v. EDMONDSON OIL CO.

457 U.S. 922 (1982)

Justice WHITE delivered the opinion of the Court.

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. The procedure required only that Edmondson allege, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition.

Petitioner subsequently brought this action under 42 U.S.C. §1983 against Edmondson and its president. His complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law.

If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under §1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, §1983, designed to provide judicial redress for just such constitutional violations.

As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments. Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has

obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors." While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a §1983 action, if the second element of the state-action requirement is met as well. [W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment.

The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute. In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation.

Lugar can be contrasted to the Supreme Court's earlier decision in Flagg Brothers v. Brooks, 436 U.S. 149 (1978). In *Flagg Brothers*, the Supreme Court held that a private creditor's self-help repossession did not constitute state action and thus due process was not required prior to the sale of her belongings. After an individual was evicted from her home, the sheriff arranged for storage of her possessions at a warehouse. The warehouse demanded that she pay the storage fees or it would sell her property. The customer claimed a right to due process before the sale, but the Supreme Court concluded that since the warehouse company was privately owned the Constitution did not apply.

The customer's primary contention was that the State of New York "delegated" to the company "a power 'traditionally exclusively reserved to the State.'" The customer argued that resolving disputes is a traditional function of government and that the government had delegated this task to the creditor by giving it the authority to sell the goods to pay the debt. The Supreme Court expressly rejected this argument and said that there were many ways in which the dispute could have been resolved: The debtor could have sought a waiver of the creditor's rights to sell her goods, the debtor could have sought to replevy her goods under state law, and the debtor had a statutory damages action available for violations of the law. The Supreme Court said that in light of all these options, it could not be said that the government delegated to the creditor "an exclusive prerogative of the sovereign."

The key difference between *Lugar* and *Flagg Brothers* was the direct involvement of a state officer, the sheriff, in the former case, while the latter was entirely private self-help. Yet, in both cases, state law provided the procedures for the debtors' action. In *Lugar*, state law provided the procedure for prejudgment attachment; in *Flagg Brothers*, state law provided for the self-help action. In fact, in *Flagg Brothers* involvement of the sheriff was unnecessary precisely because the state's law allowed the repossession action without assistance of the sheriff.

Example: Peremptory Challenges

The other major area where the Court has considered court involvement to be state action concerns the exercise of peremptory challenges. Peremptory challenges are the ability of a litigant to excuse prospective jurors without showing cause.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that equal protection prohibits prosecutors from using peremptory challenges in a discriminatory fashion in criminal cases. The issue then arose as to whether *Batson* should be applied when private litigants—such as parties in private civil litigation or even criminal defendants—exercise peremptory challenges in a discriminatory fashion.

EDMONSON v. LEESVILLE CONCRETE CO.

500 U.S. 614 (1991)

Justice KENNEDY delivered the opinion of the Court.

We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors.

Thaddeus Donald Edmonson, a construction worker, was injured in a jobsite accident at Fort Polk, Louisiana, a federal enclave. Edmonson sued Leesville Concrete Company for negligence in the United States District Court for the Western District of Louisiana, claiming that a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment. Edmonson invoked his Seventh Amendment right to a trial by jury.

During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing our decision in Batson v. Kentucky (1986), Edmonson, who is himself black, requested that the District Court require Leesville to articulate a race-neutral explanation for striking the two jurors. The District Court denied the request on the ground that *Batson* does not apply in civil proceedings. As empaneled, the jury included 11 white persons and 1 black person. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000. It also attributed 80% of the fault to Edmonson's contributory negligence, however, and awarded him the sum of $18,000.

In Powers v. Ohio (1991), we held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury. [W]e made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service.

[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.

That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.

We begin our discussion within the framework for state-action analysis set forth in *Lugar.* There we considered the state-action question in the context of a due process challenge to a State's procedure allowing private parties to obtain prejudgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

There can be no question that the first part of the *Lugar* inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact. While we have recognized the value of peremptory challenges in this regard, particularly in the criminal context, there is no constitutional obligation to allow them. Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury. Legislative authorizations, as well as limitations, for the use of peremptory challenges date as far back as the founding of the Republic; and the common-law origins of peremptories predate that.

Today in most jurisdictions, statutes or rules make a limited number of peremptory challenges available to parties in both civil and criminal proceedings. In the case before us, the challenges were exercised under a federal statute that provides, "In civil cases, each party shall be entitled to three peremptory challenges." 28 U.S.C. §1870. Without this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts.

Given that the statutory authorization for the challenges exercised in this case is clear, the remainder of our state-action analysis centers around the second part of the *Lugar* test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of

governmental authority. Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with "the overt, significant assistance of state officials." It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist.

A private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the "final and practical denial" of the excluded individual's opportunity to serve on the petit jury. Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." Burton v. Wilmington Parking Authority (1961). In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," National Collegiate Athletic Assn. v. Tarkanian (1988), and in a significant way has involved itself with invidious discrimination.

In Georgia v. McCollum, 505 U.S. 42 (1992), the Court considered "whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause." If any one is the antithesis of the government, it is a criminal defendant who is being prosecuted. Yet, for purposes of jury selection, the Court found that a criminal defendant is a state actor in exercising peremptory challenges. The Court followed exactly the same reasoning as in *Edmonson*: Laws create peremptory challenges and jury selection is a government function accomplished through the power of the state and overseen by a judge.

GOVERNMENT REGULATION

The Court also has considered the entanglement exception in instances when the government licenses or regulates an activity. In general, government licensing or regulating is insufficient for a finding of state action, unless there is other government encouraging or facilitating of unconstitutional conduct. Yet here, too, the cases are not easily reconciled.

Burton v. Wilmington Parking Authority, presented below, is the key case where government licensing and regulation was deemed sufficient for state action. The subsequent case, Moose Lodge v. Irvis, distinguishes and narrows *Burton.* The underlying question is whether there is a meaningful distinction among these cases in terms of the degree of government involvement.

BURTON v. WILMINGTON PARKING AUTHORITY

365 U.S. 715 (1961)

Justice CLARK delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. On the merits we have concluded that the exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Authority was created by the City of Wilmington pursuant to the Delaware Code. It is "a public body corporate and politic, exercising public powers of the State as an agency thereof." Its statutory purpose is to provide adequate parking facilities for the convenience of the public and thereby relieve the "parking crisis, which threatens the welfare of the community." To this end the Authority is granted wide powers including that of constructing or acquiring by lease, purchase or condemnation, lands and facilities, and that of leasing "portions of any of its garage buildings or structures for commercial uses by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities."

The first project undertaken by the Authority was the erection of a parking facility on Ninth Street in downtown Wilmington. Before it began actual construction of the facility, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and proceeds from sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its "debt-service" requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter long-term leases with responsible tenants for commercial use of some of the space available in the projected "garage building." The public was invited to bid for these leases. In April 1957 such a private lease, for 20 years and renewable for another 10 years, was made with Eagle Coffee Shoppe, Inc., for use as a "restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose."

Other portions of the structure were leased to other tenants, including a book-store, a retail jeweler, and a food store. Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags.

In August 1958 appellant parked his car in the building and walked around to enter the restaurant by its front door on Ninth Street. Having entered and sought service, he was refused it. Thereafter he filed this declaratory judgment action.

The Civil Rights Cases (1883) "embedded in our constitutional law" the principle "that the action inhibited by the first section (Equal Protection Clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings.

[I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the

lessee as certainly as though they were binding covenants written into the agreement itself.

MOOSE LODGE NO. 107 v. IRVIS

407 U.S. 163 (1972)

Justice REHNQUIST delivered the opinion of the Court.

Appellee Irvis, a Negro (hereafter appellee), was refused service by appellant Moose Lodge, a local branch of the national fraternal organization located in Harrisburg, Pennsylvania. Appellee then brought this action under 42 U.S.C. §1983 for injunctive relief in the United States District Court for the Middle District of Pennsylvania. He claimed that because the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was "state action" for the purposes of the Equal Protection Clause of the Fourteenth Amendment. He named both Moose Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief that would have required the defendant liquor board to revoke Moose Lodge's license so long as it continued its discriminatory practices.

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Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.

Appellee, while conceding the right of private clubs to choose members upon a discriminatory basis, asserts that the licensing of Moose Lodge to serve liquor by the Pennsylvania Liquor Control Board amounts to such state involvement with the club's activities as to make its discriminatory practices forbidden by the Equal Protection Clause of the Fourteenth Amendment.

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," Reitman v. Mulkey (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Our prior decisions dealing with discriminatory refusal of service in public eating places are significantly different factually from the case now before us.

Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. Unlike *Burton*, the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building.

With the exception hereafter noted, the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor. There is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation.

However detailed the regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. We therefore hold that the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter "state action" within the ambit of the Equal Protection Clause of the Fourteenth Amendment.

Justice DOUGLAS, with whom Justice MARSHALL joins, dissenting.

[T]he fact that a private club gets some kind of permit from the State or municipality does not make it ipso facto a public enterprise or undertaking, any more than the grant to a householder of a permit to operate an incinerator puts the householder in the public domain. We must, therefore, examine whether there are special circumstances involved in the Pennsylvania scheme which differentiate the liquor license possessed by Moose Lodge from the incinerator permit.

Pennsylvania has a state store system of alcohol distribution. Resale is permitted by hotels, restaurants, and private clubs which all must obtain licenses from the Liquor Control Board. The scheme of regulation is complete and pervasive; and the state courts have sustained many restrictions on the licensees. Once a license is issued the licensee must comply with many detailed requirements or risk suspension or revocation of the license. Among these requirements is Regulation §113.09 which says: "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws." This regulation means, as applied to Moose Lodge, that it must adhere to the racially discriminatory provision of the Constitution of its Supreme Lodge that "[t]he membership of lodges shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian

or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being."

[W]e have held that "a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act." It is irrelevant whether the law is statutory, or an administrative regulation. And it is irrelevant whether the discriminatory act was instigated by the regulation, or was independent of it. The result, as I see it, is the same as though Pennsylvania had put into its liquor licenses a provision that the license may not be used to dispense liquor to blacks, browns, yellows—or atheists or agnostics. Regulation §113.09 is thus an invidious form of state action.

Were this regulation the only infirmity in Pennsylvania's licensing scheme, I would perhaps agree with the majority that the appropriate relief would be a decree enjoining its enforcement. But there is another flaw in the scheme not so easily cured. Liquor licenses in Pennsylvania, unlike driver's licenses, or marriage licenses, are not freely available to those who meet racially neutral qualifications. There is a complex quota system. What the majority neglects to say is that the quota for Harrisburg, where Moose Lodge No. 107 is located, has been full for many years. No more club licenses may be issued in that city.

This state-enforced scarcity of licenses restricts the ability of blacks to obtain liquor, for liquor is commercially available only at private clubs for a significant portion of each week. Access by blacks to places that serve liquor is further limited by the fact that the state quota is filled. A group desiring to form a nondiscriminatory club which would serve blacks must purchase a license held by an existing club, which can exact a monopoly price for the transfer. The availability of such a license is speculative at best, however, for, as Moose Lodge itself concedes, without a liquor license a fraternal organization would be hard pressed to survive. Thus, the State of Pennsylvania is putting the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination.

GOVERNMENT SUBSIDIES

A third type of government entanglement is government financial support. Here, too, there are some cases indicating that this can be used as a basis for finding state action. But later decisions make it highly doubtful that subsidies by themselves, no matter how large, could justify applying the Constitution.

NORWOOD v. HARRISON

413 U.S. 455 (1973)

A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies.

Appellants, who are parents of four schoolchildren in Tunica County, Mississippi, filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the Mississippi textbook lending program. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees, acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights.

Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963-1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. In these nonpublic schools 916 students were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children. By September 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. Appellees do not challenge the statement, which is fully documented in appellants' brief, that "the creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools. . . ."

This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion or of the authority of a State to allow such schools. See Pierce v. Society of Sisters (1925). The narrow issue before us, rather, is a particular form of tangible assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State. The program dates back to a 1940 appeal for improved educational facilities by the Governor of Mississippi to the state legislature.

The appellees intimate that the State must provide assistance to private schools equivalent to that which it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not.

This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

The recurring theme of appellees' argument is a sympathetic one—that the State's textbook loan program is extended to students who attend racially segregated private schools only because the State sincerely wishes to foster quality education for all

Mississippi children, and, to that end, has taken steps to insure that no sub-group of schoolchildren will be deprived of an important educational tool merely because their parents have chosen to enroll them in segregated private schools. We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.

In Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 (1974), the Supreme Court held that a city could not give racially segregated private schools exclusive use of public recreational facilities. Montgomery, Alabama, allowed segregated private schools to have exclusive possession of football stadiums, baseball diamonds, basketball courts, and tennis courts for athletic contests and other school-sponsored events. The Court found state action because the "city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs."

Norwood and *Gilmore* both involved challenges to state government assistance to segregated private schools in Mississippi and Alabama, states with a long history of school segregation. Outside this context, however, the Court has been unwilling to find government subsidy to be a basis for finding state action. Indeed, the following two more recent cases expressly reject the argument that government subsidy is sufficient for a finding of state action.

RENDELL-BAKER v. KOHN

457 U.S. 830 (1982)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees.

I

Respondent Kohn is the director of the New Perspectives School, a nonprofit institution located on privately owned property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials. The school specializes in dealing with students who have experienced difficulty completing public high schools; many have drug, alcohol, or behavioral problems, or other special needs. In recent years, nearly all of the students at the school have been referred to it by the Brookline or

Boston School Committees, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The school issues high school diplomas certified by the Brookline School Committee.

When students are referred to the school by Brookline or Boston under Chapter 766 of the Massachusetts Acts of 1972, the School Committees in those cities pay for the students' education. The school also receives funds from a number of other state and federal agencies. In recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school's operating budget. There were approximately 50 students at the school in those years and none paid tuition.

To be eligible for tuition funding under Chapter 766, the school must comply with a variety of regulations, many of which are common to all schools. The State has issued detailed regulations concerning matters ranging from recordkeeping to student-teacher ratios. Concerning personnel policies, the Chapter 766 regulations require the school to maintain written job descriptions and written statements describing personnel standards and procedures, but they impose few specific requirements. The school is also regulated by Boston and Brookline as a result of its Chapter 766 funding.

Rendell-Baker was discharged by the school in January 1977, and the five other petitioners were discharged in June 1978. Rendell-Baker's discharge resulted from a dispute over the role of a student-staff council in making hiring decisions. A dispute arose when some students presented a petition to the school's board of directors in December 1976, seeking greater responsibilities for the student-staff council. Director Kohn opposed the proposal, but Rendell-Baker supported it and so advised the board. On December 13, Kohn notified the State Committee on Criminal Justice, which funded Rendell-Baker's position, that she intended to dismiss Rendell-Baker and employ someone else. Kohn notified Rendell-Baker of her dismissal in January 1977.

In the spring of 1978, students and staff voiced objections to Kohn's policies. The five petitioners other than Rendell-Baker, who were all teachers at the school, wrote a letter to the board of directors urging Kohn's dismissal. When the board affirmed its confidence in Kohn, students from the school picketed the home of the president of the board. The students were threatened with suspension; a local newspaper then ran a story about the controversy at the school. In response to the story, the five petitioners wrote a letter to the editor in which they stated that they thought the prohibition of picketing was unconstitutional. On the day the letter to the editor appeared, the five teachers told the president of the board that they were forming a union. Kohn discharged the teachers the next day. They brought suit against the school and its directors in December 1978.

Petitioners allege that respondents violated 42 U.S.C. §1983 by discharging them because of their exercise of their First Amendment right of free speech and without the process due them under the Fourteenth Amendment. The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action. If the action of the respondent school is not state action, our inquiry ends.

The school is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.

[Petitioners] assert that the school is a state actor [in] that it performs a "public function." However, our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the exclusive prerogative of the State." Jackson v. Metropolitan Edison Co. There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. That a private entity performs a function which serves the public does not make its acts state action.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Petitioners in these consolidated cases, former teachers and a counselor at the New Perspectives School in Brookline, Mass., were discharged by the school's administrators when they criticized certain school policies. The Court today holds that their suits must be dismissed because the school did not act "under color" of state law. According to the majority, the decision of the school to discharge petitioners cannot fairly be regarded as a decision of the Commonwealth of Massachusetts. In my view, this holding simply cannot be justified. The State has delegated to the New Perspectives School its statutory duty to educate children with special needs. The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action. I therefore dissent.

The decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it can be regarded as governmental action. Evans v. Newton.

The New Perspectives School receives virtually all of its funds from state sources. This financial dependence on the State is an important indicium of governmental involvement. The school's very survival depends on the State. If the State chooses, it may exercise complete control over the school's operations simply by threatening to withdraw financial support if the school takes action that it considers objectionable.

The school is heavily regulated and closely supervised by the State. This fact provides further support for the conclusion that its actions should be attributed to the State. When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State. Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State. Here, since the New Perspectives School exists solely to fulfill the State's obligations under Chapter 766, I think it fully reasonable to conclude that the school is a state actor.

The majority repeatedly compares the school to a private contractor that "depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." The New Perspectives School can be readily distinguished, however. Although shipbuilders and dambuilders, like the school, may be dependent on government funds, they are not so closely supervised by the government. And unlike most private contractors, the school is performing a statutory duty of the State.

Even though there are myriad indicia of state action in this case, the majority refuses to find that the school acted under color of state law when it discharged petitioners. The decision in this case marks a return to empty formalism in state action doctrine. Because I believe that the state action requirement must be given a more sensitive and flexible interpretation than the majority offers, I dissent.

In Blum v. Yaretsky, 457 U.S. 991 (1982), there was a strong argument that the government's funding of Medicaid patients caused their transfer to other less well-equipped facilities. State policy required that private facilities receiving Medicaid funding create "utilization review committees" to determine the level of care needed. After a decision from a utilization review committee, the state would terminate its Medicaid payments for patients unless they were transferred from "skilled nursing facilities" to "health related facilities." Because the state paid over 90 percent of the medical expenses for the patients, its decision clearly was responsible for the transfer decisions. The patients argued that they should be given due process with regard to their transfer.

The Supreme Court, however, ruled that there was not state action because it was the decision of the private nursing home to transfer the patients. The Court found neither the extent of state regulation nor the size of state funding to be a basis for finding state action. Furthermore, the Court found that the state financial incentives for the transfers were insufficient to constitute state action. The Court said that "a State normally can be held responsible for a private decision only when it has exercised such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."

Justice Brennan wrote a dissent emphasizing the responsibility of the state in causing these decisions about patients:

> Ignoring the State's fiscal interest in the level-of-care determination, the Court proceeds to a cursory, and misleading, discussion of the State's involvement in the assignment of residents to particular levels of care. In my view, an accurate and realistic appraisal of the procedures actually employed in the State of New York leaves no doubt that not only has the State established the system of treatment levels and utilization review in order to further its own fiscal goals, but that the State prescribes with as much precision as is possible the standards by which individual determinations are to be made. There can thus be little doubt that in the vast majority of cases, decisions as to "level of treatment" in the admission process are made according to the State's specified criteria.
>
> The degree of interdependence between the State and the nursing home is far more pronounced than it was between the State and the private entity in Burton v. Wilmington Parking Authority (1961). The State subsidizes practically all of the operating and capital costs of the facility, and pays the medical expenses of more than 90% of its residents. And, in setting reimbursement rates, the State generally affords the nursing homes a profit as well. Even more striking is the fact that the residents of those homes are, by definition, utterly dependent on the State for their support and their placement.

ENTWINEMENT

As the preceding material indicates, the Supreme Court has recognized two narrow exceptions to the state action requirement: the public functions exception, which provides that private conduct must comply with the Constitution when it is performing a task that has traditionally been done exclusively by the government; and the entanglement exception, in which the government affirmatively authorizes, encourages, or facilitates unconstitutional conduct. In Brentwood Academy v. Tennessee Secondary School Athletic Assn., the Court finds that a private entity is a state actor based on its "entwinement" with the government. The key question, not answered by the Court, is how "entwinement" relates to "entanglement." Is this a new exception to the state action requirement? If so, how is it different? Is it that entanglement requires government encouragement, but entwinement does not? None of these questions is addressed by the Court, but they will undoubtedly be litigated in the future and are thus ones to consider as you read this decision.

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BRENTWOOD ACADEMY v. TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION

531 U.S. 288 (2001)

Justice SOUTER delivered the opinion of the Court.

The issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as

engaging in state action when it enforces a rule against a member school. The association in question here includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority. We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way.

I

Respondent Tennessee Secondary School Athletic Association (Association) is a not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it. No school is forced to join, but without any other authority actually regulating interscholastic athletics, it enjoys the memberships of almost all the State's public high schools (some 290 of them or 84% of the Association's voting membership), far outnumbering the 55 private schools that belong. A member school's team may play or scrimmage only against the team of another member, absent a dispensation.

The Association's rulemaking arm is its legislative council, while its board of control tends to administration. The voting membership of each of these nine-person committees is limited under the Association's bylaws to high school principals, assistant principals, and superintendents elected by the member schools, and the public school administrators who so serve typically attend meetings during regular school hours. Although the Association's staff members are not paid by the State, they are eligible to join the State's public retirement system for its employees. Member schools pay dues to the Association, though the bulk of its revenue is gate receipts at member teams' football and basketball tournaments, many of them held in public arenas rented by the Association.

The constitution, bylaws, and rules of the Association set standards of school membership and the eligibility of students to play in interscholastic games. Each school, for example, is regulated in awarding financial aid, most coaches must have a Tennessee state teaching license, and players must meet minimum academic standards and hew to limits on student employment. Under the bylaws, "in all matters pertaining to the athletic relations of his school," the principal is responsible to the Association, which has the power "to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause."

Ever since the Association was incorporated in 1925, Tennessee's State Board of Education (State Board) has (to use its own words) acknowledged the corporation's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee." Specifically, in 1972, it went so far as to adopt a rule expressly "designat[ing]" the Association as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." [O]n several occasions over the next 20 years, the State Board reviewed, approved, or reaffirmed its approval of the recruiting Rule at issue in this case. In 1996, however, the State Board dropped the original Rule expressly designating the Association as regulator; it substituted a statement "recogniz[ing] the

value of participation in interscholastic athletics and the role of [the Association] in coordinating interscholastic athletic competition," while "authoriz[ing] the public schools of the state to voluntarily maintain membership in [the Association]."

The action before us responds to a 1997 regulatory enforcement proceeding brought against petitioner, Brentwood Academy, a private parochial high school member of the Association. The Association's board of control found that Brentwood violated a rule prohibiting "undue influence" in recruiting athletes, when it wrote to incoming students and their parents about spring football practice. The Association accordingly placed Brentwood's athletic program on probation for four years, declared its football and boys' basketball teams ineligible to compete in playoffs for two years, and imposed a $3,000 fine. When these penalties were imposed, all the voting members of the board of control and legislative council were public school administrators.

Brentwood sued the Association and its executive director in federal court under 42 U.S.C. §1983, claiming that enforcement of the Rule was state action and a violation of the First and Fourteenth Amendments.

II

A

Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not. The judicial obligation is not only to "'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control," but also to assure that constitutional standards are invoked "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."

What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents." We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies" or when government is "entwined in [its] management or control."

Amidst such variety, examples may be the best teachers, and examples from our cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies.

NCAA v. Tarkanian (1988) arose when an undoubtedly state actor, the University of Nevada, suspended its basketball coach, Tarkanian, in order to comply with rules and recommendations of the National Collegiate Athletic Association (NCAA). The coach charged the NCAA with state action, arguing that the state university had delegated its own functions to the NCAA, clothing the latter with authority to make and apply the university's rules, the result being joint action making the NCAA a state actor.

To be sure, it is not the strict holding in *Tarkanian* that points to our view of this case, for we found no state action on the part of the NCAA. We could see, on the one hand, that the university had some part in setting the NCAA's rules, and the Supreme Court of Nevada had gone so far as to hold that the NCAA had been delegated the university's traditionally exclusive public authority over personnel. But on the other side, the NCAA's policies were shaped not by the University of Nevada alone, but by several hundred member institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law. Since it was difficult to see the NCAA, not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada too insubstantial to ground a state action claim.

But dictum in *Tarkanian* pointed to a contrary result on facts like ours, with an organization whose member public schools are all within a single State. "The situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."

B

Just as we foresaw in *Tarkanian*, the "necessarily fact-bound inquiry," leads to the conclusion of state action here. The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.

The Association is not an organization of natural persons acting on their own, but of schools, and of public schools to the extent of 84% of the total. Under the Association's bylaws, each member school is represented by its principal or a faculty member, who has a vote in selecting members of the governing legislative council and board of control from eligible principals, assistant principals and superintendents.

In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private

school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.

To complement the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system.

Justice THOMAS, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join, dissenting.

We have never found state action based upon mere "entwinement." Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority's holding—that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action—not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. I respectfully dissent.

I

Like the state-action requirement of the Fourteenth Amendment, the state-action element of 42 U.S.C. §1983 excludes from its coverage "merely private conduct, however discriminatory or wrongful." "Careful adherence to the 'state action' requirement" thus "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." The state-action doctrine also promotes important values of federalism, "avoid[ing] the imposition of responsibility on a State for conduct it could not control." Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to determine whether an action "can fairly be attributed to the State."

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A

Regardless of these various tests for state action, common sense dictates that the TSSAA's actions cannot fairly be attributed to the State, and thus cannot constitute state action. The TSSAA was formed in 1925 as a private corporation to organize interscholastic athletics and to sponsor tournaments among its member schools. Any private or public secondary school may join the TSSAA by signing a contract agreeing to comply with its rules and decisions. Although public schools currently compose 84% of the TSSAA's membership, the TSSAA does not require that public schools constitute a set percentage of its membership, and, indeed, no public school need join the TSSAA. The TSSAA's rules are enforced not by a state agency but by its own board of control, which comprises high school principals, assistant principals, and superintendents, none of whom must work at a public school. Of course, at the time the recruiting rule was enforced in this case, all of the board members happened to be public school officials. However, each board member acts in a representative capacity on behalf of all the private and public schools in his region of Tennessee, and not simply his individual school.

The State of Tennessee did not create the TSSAA. The State does not fund the TSSAA and does not pay its employees. In fact, only 4% of the TSSAA's revenue comes from the dues paid by member schools; the bulk of its operating budget is derived from gate receipts at tournaments it sponsors. The State does not permit the TSSAA to use state-owned facilities for a discounted fee, and it does not exempt the TSSAA from state taxation. No Tennessee law authorizes the State to coordinate interscholastic athletics or empowers another entity to organize interscholastic athletics on behalf of the State. The only state pronouncement acknowledging the TSSAA's existence is a rule providing that the State Board of Education permits public schools to maintain membership in the TSSAA if they so choose.

Moreover, the State of Tennessee has never had any involvement in the particular action taken by the TSSAA in this case: the enforcement of the TSSAA's recruiting rule prohibiting members from using "undue influence" on students or their parents or guardians "to secure or to retain a student for athletic purposes." There is no indication that the State has ever had any interest in how schools choose to regulate recruiting. In fact, the TSSAA's authority to enforce its recruiting rule arises solely from the voluntary membership contract that each member school signs, agreeing to conduct its athletics in accordance with the rules and decisions of the TSSAA.

B

Even approaching the issue in terms of any of the Court's specific state-action tests, the conclusion is the same: The TSSAA's enforcement of its recruiting rule against Brentwood Academy is not state action. The TSSAA has not performed a function that has been "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co. (1974). The organization of interscholastic sports is neither a traditional nor an exclusive public function of the States. Widespread organization and administration of interscholastic contests by schools did not begin until the 20th century. Indeed, no one claims that the State of Tennessee played any role in the creation of the TSSAA as a private corporation in 1925. The TSSAA was designed to fulfill an objective—the organization of interscholastic athletic tournaments—that the government had not contemplated, much less pursued. And although the board of control currently is composed of public school officials, and although public schools currently account for the majority of the TSSAA's membership, this is not required by the TSSAA's constitution.

In addition, the State of Tennessee has not "exercised coercive power or . . . provided such significant encouragement [to the TSSAA], either overt or covert," that the TSSAA's regulatory activities must in law be deemed to be those of the State. The State has not promulgated any regulations of interscholastic sports, and nothing in the record suggests that the State has encouraged or coerced the TSSAA in enforcing its recruiting rule. To be sure, public schools do provide a small portion of the TSSAA's funding through their membership dues, but no one argues that these dues are somehow conditioned on the TSSAA's enactment and enforcement of recruiting rules. Likewise, even if the TSSAA were dependent on state funding to the extent of 90%, instead of less than 4%, mere financial dependence on the State does not convert the TSSAA's actions into acts of the State.

Finally, there is no "symbiotic relationship" between the State and the TSSAA. Contrary to the majority's assertion, the TSSAA's "fiscal relationship with the State is not different from that of many contractors performing services for the government." The TSSAA provides a service—the organization of athletic tournaments—in exchange for membership dues and gate fees, just as a vendor could contract with public schools to sell refreshments at school events. Certainly the public school could sell its own refreshments, yet the existence of that option does not transform the service performed by the contractor into a state action. Also, there is no suggestion in this case that, as was the case in *Burton*, the State profits from the TSSAA's decision to enforce its recruiting rule.

Because I do not believe that the TSSAA's action of enforcing its recruiting rule is fairly attributable to the State of Tennessee, I would affirm.

II

Although the TSSAA's enforcement activities cannot be considered state action as a matter of common sense or under any of this Court's existing theories of state action, the majority presents a new theory. Under this theory, the majority holds that the combination of factors it identifies evidences "entwinement" of the State with the TSSAA, and that such entwinement converts private action into state action. The majority does not define "entwinement," and the meaning of the term is not altogether clear. But whatever this new "entwinement" theory may entail, it lacks any support in our state-action jurisprudence. There is no case in which we have rested a finding of state action on entwinement alone.

Because the majority never defines "entwinement," the scope of its holding is unclear. If we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case. But if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools—not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties. I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does, and our state-action jurisprudence has never reached that far. The state-action doctrine was developed to reach only those actions that are truly attributable to the State, not to subject private citizens to the control of federal courts hearing §1983 actions. I respectfully dissent.

Notes

1 Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), discussed in Chapter 6.

2 83 U.S. (16 Wall.) 36 (1872), discussed hereafter.

3 John Hart Ely, *Democracy and Distrust* 196 n.58 (1980).

4 Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., dissenting).

5 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

6 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

7 Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871).

8 Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 132, 137 (1949).

9 Legislative Reference Service, Library of Congress, *The Constitution of the United States of America* 965 (Edward S. Corwin ed., 1953).

10 In Colgate v. Harvey, 296 U.S. 404 (1935), the Supreme Court invalidated a state tax that applied solely to income and dividends earned outside the state. In part, the Court said that this was unconstitutional because it infringed a "privilege . . . attributable to national citizenship." *Id.* at 430. However, four years later, the Court overruled *Colgate* in Madden v. Kentucky, 309 U.S. 83 (1940). Also, in Edwards v. California, 314 U.S. 160 (1941), four justices relied on the Privileges or Immunities Clause as creating a right to interstate travel and as a basis for invalidating a California law that made it a crime to bring an indigent person into the state.

11 Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 Harv. J.L. & Pub. Poly. 63, 68 (1989); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405, 418-420.

12 The case is presented here for its discussion of the Privileges or Immunities Clause of the Fourteenth Amendment. The right to travel is discussed in detail in Chapter 8.

13 *See*, *e.g.*, Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

14 Palko v. Connecticut, 302 U.S. 319, 326 (1937).

15 *Id.* at 325.

16 Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

17 In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court overruled *Adamson* and held that the Due Process Clause of the Fourteenth Amendment was violated by a prosecutor's comments on a defendant's silence. [Footnote by casebook author.]

18 *See* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (finding that the Third Amendment is incorporated).

19 Hurtado v. California, 110 U.S. 516 (1884).

20 Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211 (1916).

21 *See* Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting) (using the "jot-for-jot" language).

22 Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985). *Wallace* involved a First Amendment Establishment Clause challenge to school prayers. Some justices, at times, have suggested that they believed that the First Amendment's protection of freedom of speech apply differently to states than to the federal government. *See*, *e.g.*, Roth v. United States, 354 U.S. 476 (1957) (Harlan, J., concurring); Beauharnais v. Illinois, 343 U.S. 250 (1952) (Jackson, J., dissenting).

23 Malloy v. Hogan, 378 U.S. 1, 10 (1964).

24 *Id.* at 10-11 (citations omitted).

25 Burch v. Louisiana, 441 U.S. 130 (1979).

26 United States v. Reynolds, 235 U.S. 133 (1914); *see also* Bailey v. Alabama, 219 U.S. 219 (1911) (it is unconstitutional to imprison a person for failure to pay debt). However, the Supreme Court has held that injunctions to halt labor disputes do not violate the Thirteenth Amendment. *See* International Union v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949). The Court also has ruled that the military draft does not violate the Thirteenth Amendment, Arver v. United States, 245 U.S. 366, 390 (1918), and that it does not violate the Thirteenth Amendment for a state to require that all able-bodied men between the ages of 21 and 45 work on road construction for a period of time. Butler v. Perry, 240 U.S. 328 (1916).

27 Congress's authority to adopt such laws is discussed in Chapter 2.

28 Cal. Educ. Code §48950(a) ("School districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus, is protected by governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."). *See also* §94367(a) (identical provision applied to private post-secondary schools).

29 Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

30 *Id.* at 936.

31 109 U.S. at 11.

32 Charles L. Black, Jr., *Foreword*: *"State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967).

33 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991).

34 *See* Lebron v. National Railroad Passenger Corp. (Amtrak), 12 F.3d 388, 392 (2d Cir. 1993), *rev'd on other grounds*, 513 U.S. 374 (1995).

35 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), discussed later.

36 This is discussed in detail in Chapter 9.

37 In Pennsylvania v. Board of Directors of City Trust of the City of Philadelphia, 353 U.S. 230 (1957), the Court, without expressly citing *Shelley*, found that there was state action when public officials ran a private trust, for a school for orphans, in a racially discriminatory manner. *See also* Evans v. Newton, 382 U.S. 296 (1966) (finding state action when the city delegated running a private park, segregated pursuant to the terms of a will, to a private entity that racially discriminated), presented earlier.

Economic Liberties

A. INTRODUCTION

Some constitutional rights can be grouped together under the category of "economic liberties." Economic liberties generally refer to constitutional rights concerning the ability

to enter into and enforce contracts; to pursue a trade or profession; and to acquire, possess, and convey property.

For example, the Contracts Clause found in Article I, §10 of the Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Also, several constitutional provisions protect property rights. The Fifth Amendment's Takings Clause states "nor shall private property be taken for public use without just compensation." The Fifth and Fourteenth Amendments, respectively, provide that neither the federal nor state governments can take a person's property (or life or liberty) without due process of law. At times, the Court also has used the Due Process Clause to protect other economic liberties such as freedom of contract, freedom to pursue a livelihood, and freedom to practice a trade or profession.

This chapter focuses on all of these economic liberties. Throughout this chapter the key normative issue concerns the appropriate degree of judicial protection for economic liberties. How important are the rights of property and contracting? What was the framers' intent concerning these rights? Does the legislature have a special expertise concerning these rights that justifies a greater degree of judicial deference compared to when the Court deals with political and civil liberties, such as freedom of speech and the right to vote? What, if anything, was wrong with the Court's decisions in the first third of the twentieth century aggressively protecting economic rights? Since 1937, has the Court unduly or appropriately deferred to government economic regulations?

HISTORICAL OVERVIEW

The framers obviously were concerned about protecting economic rights and thus included in the Constitution provisions such as the Contracts Clause and the Takings Clause. Indeed, Charles Beard, in a famous book published early in the twentieth century, argued that the primary impetus for the Constitution was a desire to protect property and wealth.[1] Although later historians have challenged Beard's analysis and conclusions,[2] there is no doubt that the framers intended to protect economic rights.

The Supreme Court's protection of economic liberties has varied enormously over time. In the early nineteenth century, the Court invoked natural law principles to protect property rights.[3] Also, throughout the nineteenth century, the Court aggressively used the Contracts Clause to limit the ability of states to interfere with existing contractual obligations.

Beginning in the late nineteenth century and continuing until 1937, the Court found that freedom of contract was a basic right under the liberty and property provisions of the Due Process Clause. During this period of constitutional history, sometimes referred to as the *Lochner* era,[4] the Court aggressively protected economic rights under the Due Process Clause. Many state laws, such as minimum wage and maximum hour statutes, were declared unconstitutional as violating the Fourteenth Amendment by impermissibly interfering with freedom of contract. The Contracts Clause was not used often during this era; the protection of freedom of contract under the Due Process Clause made the Contracts Clause superfluous. Freedom of contract under the Due Process Clause limited the government's ability both to impair existing contracts and to regulate the

content of future contracts; the Contracts Clause always has been confined to the former.

It is extremely important to note that during this same era the Court used federalism to limit the ability of Congress to regulate the economy. From the late nineteenth century until 1937, the Court narrowly defined the scope of Congress's powers under the Commerce Clause and it also found that the Tenth Amendment reserved a zone of authority exclusively to the states. In other words, if a state adopted a minimum wage or a maximum hour law, it likely would have been invalidated for violating the Due Process Clause of the Fourteenth Amendment. But if the federal government adopted the same law, it would have been declared unconstitutional as exceeding the scope of Congress's powers or as violating states' rights and the Tenth Amendment. The decisions during this era concerning the scope of Congress's powers are presented in Chapter 2. Although the doctrines used were different, they were inspired by the same philosophy: a strong commitment to a laissez-faire economy and to protecting business from government regulations.

After 1937, the law changed dramatically and the Court adopted a policy of great deference to government economic regulations. No longer did the Court protect freedom of contract under the liberty of the Due Process Clause. Nor did the Court impose limits on Congress's ability to regulate the economy based on federalism or on narrow definitions of federal powers.

This reluctance to protect economic liberties also has manifested itself in cases under the Contracts Clause. Only twice since 1937 has the Court found that any law violates the Contracts Clause in Article I, §10.[5] However, especially in the last two decades, the Court has used the Takings Clause to protect property rights.

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ORGANIZATION OF THE CHAPTER

Section B examines economic substantive due process. Specifically, as discussed below, the focus is on the Court's interpretation of the word "liberty" in the Due Process Clause to protect freedom of contract as a fundamental right. The discussion of substantive due process is placed first simply because it has dominated the Court's approach to economic liberties in this century. In the first third of the twentieth century, the Court's use of substantive due process to protect economic rights made most of the other constitutional provisions in the area unnecessary. Since 1937, however, the Court's tremendous reluctance to use economic substantive due process has been paralleled by a general unwillingness to safeguard economic liberties.

Section C focuses on the Contracts Clause. It briefly describes the Court's active use of this provision in the nineteenth century and then examines contemporary decisions limiting the scope of this Clause.

Finally, Section D discusses the Takings Clause. Four major questions are considered: What is a "taking"? What is "property"? When is a taking for "public use"? And what is the requirement for "just compensation"?

B. ECONOMIC SUBSTANTIVE DUE PROCESS

1. Introduction

The Fifth and Fourteenth Amendments provide, respectively, that neither the federal nor the state governments can deprive any person of life, liberty, or property without due process of law. The Due Process Clauses have been interpreted to provide two different types of protection. One is termed "procedural due process." As the phrase implies, this refers to the procedures that government must follow when it takes away a person's life, liberty, or property. For example, procedural due process often focuses on what kind of notice and what type of a hearing the government must provide when it deprives a person of life, liberty, or property. Procedural due process is presented in detail in Chapter 8.

The other use of the Due Process Clause is called "substantive due process." Substantive due process asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, the focus is on the sufficiency of the justification for the government's action, not on the procedures the government has followed. For example, when a right under the Due Process Clause is deemed fundamental by the Supreme Court, the government must prove that its action is necessary to achieve a compelling purpose.

A simple example contrasts procedural and substantive due process. The Supreme Court has held that the word "liberty" in the Due Process Clause protects a fundamental right of parents to the custody of their children. The Court has said that "procedural due process" requires notice and a hearing—-procedures—before termination of custody. By comparison, "substantive due process" requires that the government show a compelling reason for terminating custody, such as by proving parental abuse or neglect.

Over the course of American history, substantive due process has been used primarily in two areas: protecting economic liberties and safeguarding privacy. The former is the focus of this section. The latter, on privacy and autonomy rights, is discussed in Chapter 8.

In presenting economic substantive due process, this section next describes the early history of the doctrine. Then it presents the economic substantive due process cases in the late nineteenth century through 1937, when the Supreme Court aggressively used this doctrine to invalidate government economic regulations. Finally, the section concludes by examining the economic substantive due process decisions since 1937, a time of great judicial deference to government economic regulations.

2. The Early History of Economic Substantive Due Process

The Supreme Court rejected the first attempts to use the Due Process Clause to protect economic rights from government interference. In Murray v. Hoboken Land & Improvement Co.,[6] the Court denied a due process challenge to an attempt by the government to collect delinquent taxes. The Court emphasized that due process is met as long as the government's *procedures* are in accordance with the law.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Court expressly rejected a substantive due process claim.[7] The *Slaughter-House Cases* involved a challenge to a Louisiana law that granted a private company a 25-year monopoly in the livestock landing and slaughterhouse business. The law also required that the company allow any person to use the facilities to slaughter animals for a fixed fee.

Several butchers brought a lawsuit challenging the constitutionality of the grant of a monopoly. In addition to arguing that the law was involuntary servitude in violation of the Thirteenth Amendment, that it violated the Privileges or Immunities Clause, and that it violated the Equal Protection Clauses of the Fourteenth Amendment, the plaintiffs contended that it denied their right to practice their trade and thus violated the Due Process Clause. The Supreme Court rejected all of these arguments. As to due process, the Court emphasized that this Clause concerned the procedures that government must follow and thus could not be used to challenge the law for interfering with the right of butchers to practice their trade. Indeed, the Court said 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."[8] The Court flatly rejected the idea that the Due Process Clause could be used to safeguard a right to practice a trade or profession from arbitrary government interference.

Justices Field and Bradley strongly dissented. In addition to disagreeing with the majority as to the meaning of the Privileges or Immunities Clause, Field and Bradley also differed as to the content of the Due Process Clause. They saw the Due Process Clause as limiting the ability of states to adopt arbitrary laws, especially ones that interfered with natural rights. Justice Bradley, for example, declared, "[T]he individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This 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." In other words, Justice Bradley interpreted the words liberty and property in the Due Process Clause as protecting a right to practice a trade or profession and believed that arbitrary interference with these rights violated the Fourteenth Amendment. Although this position was rejected by a majority of the Court in the *Slaughter-House Cases*, it soon became the majority view of the Supreme Court.

Beginning in the 1870s, government regulation significantly increased as industrialization changed the nature of the economy. Simultaneously, businesses turned to the courts to have the new regulatory laws declared unconstitutional. At the same time, over these decades, scholars and judges increasingly espoused a belief in a laissez-faire, unregulated economy. In part, this was based on a philosophy of social Darwinism, which professed that society would thrive with the least government regulation interference, allowing the "best" to advance and prosper.[9] Additionally, this view was based on a belief that government regulations unduly interfered with the natural rights of people to own and use their property and with a basic liberty interest in freedom of contract.[10] Furthermore, support for a laissez-faire philosophy simply reflected hostility by businesses to the increased government regulation designed to protect workers, unions, consumers, and competitors.

Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1874), decided one year after the *Slaughter-House Cases*, is regarded as one of the first instances of the Court's using natural law principles to limit government regulatory power. In Loan Association v. Topeka, the Court invalidated a city law that imposed a tax to fund bonds to attract private businesses to Topeka. Without expressly referring to the Constitution because the case arose as a diversity suit, the Court invalidated the law as "purely in aid of private or personal [objects] beyond the legislative power, and an unauthorized invasion of private right."

Over the next two decades, in a series of cases, the Supreme Court rejected due process challenges to government economic regulations. Yet, in these cases, Supreme Court dicta indicated that it would invalidate laws as violating due process if they interfered with natural principles of justice. Although these cases articulated the principles of substantive economic due process, the Court did not use them to declare laws unconstitutional.

For example, in Munn v. Illinois, 94 U.S. 113 (1876), the Court upheld a state law that set maximum rates for grain-storage warehouses. The Court indicated, however, that "under some circumstances" regulation of business would be found to violate due process. The Court said that the central question was whether the "private property is 'affected with a public interest,' . . . [because] when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good." The Court expressly declared that it was for the judiciary to evaluate the reasonableness of state regulations. The Court stated, "Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially."

In the *Railroad Commission Cases*, 116 U.S. 307 (1886), the Court upheld a state law regulating railroad rates, but the Court indicated that due process could be used to challenge such rates in the future. The Court stated that the "power to regulate is not a power to destroy. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." Indeed, just a few years later, the Court found a state railroad regulation to violate the Due Process Clause and held that "[t]he question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination."[11]

In Mugler v. Kansas, 123 U.S. 623 (1887), the Court upheld as constitutional a state law that prohibited the sale of alcoholic beverages. But the Court strongly indicated that state laws would be invalidated as violating due process unless they truly were an exercise of the state's police power. The Court said that if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution."

Munn v. Illinois, the *Railroad Commission Cases*, and Mugler v. Kansas were important for articulating that due process was a limit on the government's regulatory power, even

though in each of these cases the Court ruled in favor of the government. The Court expressed the philosophy that was to dominate constitutional law for the first third of the twentieth century. Moreover, at about the same time, in 1886, the Supreme Court held that corporations were "persons" under the Due Process and Equal Protection Clauses.[12] This meant, of course, that corporations could use the Constitution and the philosophy expressed in cases such as *Munn*, the *Railroad Commission Cases*, and *Mugler* to challenge government regulations.

3. Substantive Due Process of the *Lochner* Era

The above cases suggested the Court's willingness to use the Due Process Clause to invalidate government economic regulations as interfering with freedom of contract. The Court did so in Allgeyer v. Louisiana.

ALLGEYER v. LOUISIANA

165 U.S. 578 (1897)

Justice PECKHAM delivered the opinion of the Court.

A conditional prohibition in regard to foreign insurance companies doing business within the state of Louisiana is to be found in article 236 of the constitution of that state, which reads as follows: "No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute.

In this case, [however], the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

The supreme court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the federal constitution, in that it deprives the defendants

of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the constitution of the Union. The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Has not a citizen of a state, under the provisions of the federal constitution above mentioned, a right to contract outside of the state for insurance on his property,—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, —one which the defendants were at liberty to perform, and which the state legislature had no right to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution.

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The Atlantic Mutual Insurance Company of New York has done no business of insurance within the state of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the state of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the state of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state. For these reasons we think the statute in question was a violation of the federal constitution.

Eight years after *Allgeyer*, the Supreme Court followed its reasoning and used substantive due process to invalidate a state law protecting workers in Lochner v. New York. *Lochner* is the most famous case of the era, in part because it so clearly expressed the themes followed by the Court in using freedom of contract under the Due Process Clause to limit government economic regulations.

LOCHNER v. NEW YORK

198 U.S. 45 (1905)

Justice PECKHAM delivered the opinion of the Court.

[T]he defendant [was convicted] of a misdemeanor [for violating the following law]:

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

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana. 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.

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There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are 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. Among the later cases where the state law has been upheld by this court is that of Holden v. Hardy. 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 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

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

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

wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

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

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.

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. 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. 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 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.

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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. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

[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.

I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment 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.

Justice HARLAN, with whom Justice WHITE and Justice DAY join, dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, equally by the Federal and State courts. All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. The 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.

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 must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs." Nearly all bakers are palefaced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries.

We are not to presume that the state of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not

appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect.

Lochner v. New York thus announced three themes that were followed until 1937: Freedom of contract was a right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments; the government could interfere with freedom of contract only to serve a valid police purpose of protecting public health, public safety, or public morals; and the judiciary would carefully scrutinize legislation to ensure that it truly served such a police purpose. This is classic substantive due process: The Due Process Clause was used not to ensure that the government followed proper procedures but to ensure that laws served an adequate purpose. The Court scrutinized both the ends served by the legislation, to ensure that there really was a valid police purpose, and the means, for the law to sufficiently achieve its purported goal.

Over the next three decades, the Court followed the principles articulated in *Lochner*, finding many laws unconstitutional as interfering with freedom of contract. It is estimated that almost 200 state laws were declared unconstitutional as violating the Due Process Clause of the Fourteenth Amendment.[13] Yet, during this time, the Court upheld many state and federal economic regulations as sufficiently related to a valid police purpose. It is difficult to reconcile some of the decisions from this era. The cases, reviewed below, concerned statutes protecting unions, setting maximum hours, requiring a minimum wage, regulating prices, and safeguarding consumers.

LAWS PROTECTING UNIONIZING

In the early part of the twentieth century, as workers attempted to unionize, many states and the federal government adopted laws to facilitate unionization by prohibiting employers from insisting, as a condition of employment, that employees agree not to join a union. The Supreme Court declared the laws unconstitutional as impermissibly infringing freedom of contract. In Adair v. United States, 208 U.S. 161 (1908), the Court declared unconstitutional such a federal law and said in an opinion by Justice Harlan, “While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.”

In Coppage v. Kansas, 236 U.S. 1 (1915), the Court declared unconstitutional a state law and in an opinion by Justice Pitney stated:

Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Supposing an employer is unwilling to have in his employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? Approaching the matter from a somewhat different standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a sine qua non of the inception of the employment, or of its continuance if it be terminable at will.

Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

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An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. [N]othing of that sort is involved in this case.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "it takes two to make a bargain."

MAXIMUM HOURS LAWS

In *Lochner*, the Court declared unconstitutional a state law setting maximum hours for bakers. The Court's opinion in *Lochner* distinguished Holden v. Hardy, 169 U.S. 366 (1898), in which the Court had upheld a maximum hours law for coal miners. The legislature sought to protect the health of miners by limiting their exposure to coal dust. In *Lochner*, the Court distinguished *Holden* as a legitimate exercise of the police power

of the state and concluded that there "is nothing in Holden v. Hardy which covers the case now before us."

Three years after *Lochner*, in Muller v. Oregon, the Court upheld a maximum hours law for women. *Muller* is especially famous because attorney and later Supreme Court Justice Louis Brandeis wrote a detailed 113-page brief purporting to document that women's reproductive health required limiting nondomestic work. After *Lochner* held that there had to be proof that a law was closely related to advancing public health, public safety, or public morals, attorneys began filing detailed briefs, filled with social science data, seeking to show the need for the law. Often termed the "Brandeis brief" because of what Louis Brandeis filed in *Muller*, these documents used social science data to demonstrate the need for a particular law.

MULLER v. OREGON

208 U.S. 412 (1908)

Justice BREWER delivered the opinion of the Court.

On February 19, 1903, the legislature of the state of Oregon passed an act, the first section of which is in these words:

> Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.

The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters. [The brief presents] extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would, of course, take too much space to give these reports in detail. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: "The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far reaching that the need for such reduction need hardly be discussed."

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It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without

conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength. [T]his control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.

It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

For these reasons, and without questioning in any respect the decision in Lochner v. New York, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution.

A decade later, in Bunting v. Oregon, 243 U.S. 426 (1917), the Court upheld a maximum hours law for men and women in manufacturing jobs. The state established a ten-hour workday for those involved in manufacturing positions. The Supreme Court found that the law was a valid exercise of the state's police power because it was needed to protect the health of employees in these industries.

MINIMUM WAGE LAWS

Although in Muller v. Oregon the Court upheld maximum hour laws for women, it declared unconstitutional minimum wage laws for women.

ADKINS v. CHILDREN'S HOSPITAL

261 U.S. 525 (1923)

Justice SUTHERLAND delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia.

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the Due Process Clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered.

[T]he ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. 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 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.

What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: The individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.

The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. It follows, from what has been said, that the act in question passes the limit prescribed by the Constitution.

The Court reaffirmed *Adkins* in 1936, in Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936), which also declared unconstitutional a state minimum wage law for women. In *Morehead*, as in *Adkins*, the Court found that the minimum wage law impermissibly interfered with freedom of contract because it did not serve a valid state police purpose.

CONSUMER PROTECTION LEGISLATION

Another type of legislation that was invalidated was consumer protection legislation. The following case is illustrative.

WEAVER v. PALMER BROS. CO.

270 U.S. 402 (1926)

Justice BUTLER delivered the opinion of the Court.

The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the Due Process Clause or the Equal Protection Clause.

Appellee makes approximately 3,000,000 comfortables [bedcovers] annually, and about 750,000 of these are filled with materials defined by the act as shoddy. New material from which appellee makes shoddy consists of clippings and pieces of new cloth obtained from cutting tables in garment factories; secondhand shoddy is made of secondhand garments, rags, and the like. Comfortables made of secondhand shoddy sell at lower prices than those filled with other materials.

There is no controversy between the parties as to whether shoddy may be rendered harmless by disinfection or sterilization. While it is sometimes made from filthy rags, and from other materials that have been exposed to infection, it stands undisputed that all dangers to health may be eliminated by appropriate treatment at low cost.

There was no evidence that any sickness or disease was ever caused by the use of shoddy, and the record contains persuasive evidence, and by citation discloses the opinions of scientists eminent in fields related to public health that the transmission of disease-producing bacteria is almost entirely by immediate contact with, or close proximity to, infected persons; that such bacteria perish rapidly when separated from human or animal organisms; and that there is no probability that such bacteria or vermin likely to carry them survive after the period usually required for the gathering of the materials, the production of shoddy, and the manufacture and the shipping of comfortables. This evidence tends strongly to show that in the absence of sterilization or disinfection there would be little, if any, danger to the health of the users of comfortables filled with shoddy, new or secondhand; and confirms the conclusion that all danger from the use of shoddy may be eliminated by sterilization.

Here it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health; and the fact that the act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

Justice HOLMES (dissenting).

If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The Legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was wide spread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the Legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery.

Another type of consumer protection legislation considered by the Court was price regulations. Laws setting the maximum prices for theater tickets,[14] employment agencies,[15] and gasoline[16] were declared unconstitutional as interfering with freedom of contract. The Court repeatedly distinguished Munn v. Illinois, which had upheld price controls for grain storage on the ground that it affected the public interest.[17] The Court stressed the importance of freedom of contract and narrowly defined the permissible scope of the government's police power.

However, toward the end of the *Lochner* era, in 1934, the Court upheld price regulations for milk in Nebbia v. New York. In Nebbia v. New York, 291 U.S. 502 (1934), the Supreme Court upheld a New York law that set prices for milk. On the one hand, this can be viewed as a narrow decision based on strong evidence of the importance of milk and a legislative finding that "the evils [in the market] . . . could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry." Although, as discussed above, the *Lochner* Court had invalidated some price controls, it had upheld others in businesses that it deemed to affect the public interest. *Nebbia* might be seen as a limited ruling following those cases.

Yet the language of the Court's opinion in *Nebbia* was broader than that; the Court seemed to question the basic premises of the *Lochner* era. The Court said, for example, "But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. . . . [T]his court from the early days [has] affirmed that the power to promote the general welfare is inherent in government." The Court went even further in declaring a need for judicial deference to legislative choices: "So far as the requirement of due process is concerned and in the absence of other constitutional restraints, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it." In other words, in *Nebbia*, the Court appeared to question the premises of the *Lochner* era that the government only could regulate to achieve a police purpose and that the Court needed to review laws aggressively to ensure that they truly served a police purpose.

4. Economic Substantive Due Process Since 1937

PRESSURES FOR CHANGE

By the mid-1930s, enormous pressures were mounting for the Court to abandon the laissez-faire philosophy of the *Lochner* era. The Depression created a widespread perception that government economic regulations were essential. With millions unemployed and with wages incredibly low for those with jobs, employees had no realistic chance of bargaining in the workplace.

The intellectual foundations of the *Lochner* era also were under attack. *Lochner* rested on the assumption that freedom of contract and related property rights were part of the natural liberties possessed by individuals. Legal realists attacked this premise and persuasively argued that the law reflected political choices; using freedom of contract to invalidate state laws was a political choice that favored employers over employees and corporations over consumers.[18] As such, the Supreme Court's decision in *Lochner* and its progeny could not be regarded as "restoring the natural order which had been upset by the legislature . . . [because] [t]here was no 'natural' economic order to upset or restore."[19] If the law merely reflected political choices, there was no reason for the Court to overturn the decisions made by the political process.

At the same time, there were strong political pressures for change. After Franklin Roosevelt was elected to a second term as president in 1936, he proposed a "Court-packing plan," in which the president could appoint one additional justice for every justice on the Court who was over age 70, up to a maximum of 15 justices.[20] Roosevelt was particularly upset that the Court had invalidated several key pieces of New Deal legislation as part of its commitment to a laissez-faire philosophy.[21]

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THE END OF LOCHNERISM

In 1937, in two cases—one involving substantive due process and one involving the scope of Congress's commerce power—Justice Owen Roberts switched sides and cast the fifth vote to uphold the statutes. Perhaps this was a reaction to the Court-packing plan or perhaps he made up his mind in these cases before even learning about that threat. Regardless, in these two decisions, the Court signaled the end of the laissez-faire jurisprudence that had dominated constitutional law for several decades.

In West Coast Hotel v. Parrish, below, the Court signaled the end of substantive economic due process; the Court upheld a state law that required a minimum wage for women employees and expressly overruled Adkins v. Children's Hospital and Morehead v. Tipaldo.

WEST COAST HOTEL CO. v. PARRISH

300 U.S. 379 (1937)

Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington. The act, entitled “Minimum Wages for Women,” authorizes the fixing of minimum wages for women and minors.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

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This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

We think that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled

to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.

One year after West Coast Hotel v. Parrish, the Supreme Court reaffirmed its holding and the new policy of judicial deference to government economic regulations. In United States v. Carolene Products Co., below, the Court upheld the Filled Milk Act of 1923 that prohibited "filled milk," a substance obtained by mixing milk and vegetable oil. *Carolene Products* is perhaps most famous for a footnote within it—footnote 4—that proclaims a need for judicial deference to government economic regulations, with more aggressive judicial review reserved for cases involving fundamental rights and "discrete and insular minorities."

UNITED STATES v. CAROLENE PRODUCTS CO.

304 U.S. 144 (1938)

Justice STONE delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923, which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, infringes the Fifth Amendment.

Appellee was indicted in the District Court for Southern Illinois for violation of the act by the shipment in interstate commerce of certain packages of "Milnut," a compound of

condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the act.

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

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. There is nothing in the Constitution which compels a Legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.

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.[22]

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. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.

Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be

left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

ECONOMIC SUBSTANTIVE DUE PROCESS SINCE 1937

Since 1937, not one state or federal economic regulation has been found unconstitutional as infringing liberty of contract as protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court has made it clear that economic regulations—laws regulating business and employment practices—will be upheld when challenged under the Due Process Clause as long as they are rationally related to a legitimate government purpose.

The government's purpose can be any goal not prohibited by the Constitution. In fact, it does not need to be proven that the asserted purpose was the legislature's actual objective. Any conceivable purpose is sufficient. The law only need seem to be a reasonable way of attaining the end; it did not need to be narrowly tailored to achieving the goal.

The reality is that virtually any law can meet this very deferential requirement. The following case, Williamson v. Lee Optical of Oklahoma, Inc., often is referred to as a paradigm example of post-1937 judicial deference to government economic regulations.

WILLIAMSON v. LEE OPTICAL OF OKLAHOMA, INC.

348 U.S. 483 (1955)

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 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.

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. People of State of New York; West Coast Hotel Co. v. Parrish. We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Several other cases, like *Williamson*, reveal how unlikely it is that any economic regulation will be found to violate due process. In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), the Court unanimously upheld a state "right to work" law, which mandated that no person could be denied a job for failure to join a union. The Court stressed that it had long repudiated the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine." The Court said that states could legislate against "injurious practices in their internal commercial and business affairs, so long as their

laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court upheld a Kansas law that made it unlawful for a person to engage in the business of debt adjusting, except incident to the practice of law. A debt adjustor would make a deal with a debtor to pay money to the adjustor on a regular basis, and the adjustor would then distribute it to the debtor's creditors based on an agreed-on plan. The effect of the Kansas law was to put debt adjusters, who were not lawyers, out of business.

Justice Black, writing for the Court, said, "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . [That doctrine] has long since been discarded. . . . It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law."

Ferguson shows that the Court no longer interpreted the Due Process Clause to protect a right to practice a trade or profession or even freedom of contract. The Kansas law undoubtedly was an anticompetitive measure to give lawyers a monopoly in debt adjustments. Nonetheless, the Court proclaimed deference to the legislature and upheld the law.

THE REBIRTH OF ECONOMIC DUE PROCESS? CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES

Although no law has been invalidated on economic substantive due process grounds since 1937, the following recent cases involve the Supreme Court invalidating large punitive damage awards as violating due process. These cases, of course, also involve economic substantive due process: the Court using the Due Process Clause to declare unconstitutional a government action, here by state courts, as not sufficiently justified. To this point, there have been three Supreme Court decisions elaborating *constitutional* limits on punitive damages.

BMW OF NORTH AMERICA, INC. v. GORE

517 U.S. 559 (1996)

Justice STEVENS delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "grossly excessive" punishment on a tortfeasor. TXO Production Corp. v. Alliance Resources Corp. (1993). The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers,

of predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit.

I

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look "'snazzier than it normally would appear.'" Mr. Slick, the proprietor, detected evidence that the car had been repainted. Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles. Dr. Gore alleged that the failure to disclose that the car had been repainted constituted suppression of a material fact. The complaint prayed for $500,000 in compensatory and punitive damages, and costs.

At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired. To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle. Using the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

The jury returned a verdict finding BMW liable for compensatory damages of $4,000. In addition, the jury assessed $4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud.

On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is $2,000,000," and therefore ordered a remittitur in that amount.

II

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.

Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner.

We may assume, arguendo, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States. Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, Gibbons v. Ogden (1824), but is also constrained by the need to respect the interests of other States.

We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

III

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

DEGREE OF REPREHENSIBILITY

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." Day v. Woodworth (1852).

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

RATIO

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree.

In Pacific Mutual Insurance v. Haslip (1991) we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety." TXO v. Alliance Resource Corp. (1993), following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'"

The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*. In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified

on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow."

SANCTIONS FOR COMPARABLE MISCONDUCT

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000; other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000. None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. We are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.

p. 610

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.'" Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for "reasonableness," furnishes a defendant with all the process that is "due." I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable. This view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive damages cases. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it stare decisis effect—indeed, I do not feel justified in doing so.

Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

That the issue has been framed in terms of a constitutional right against unreasonably excessive awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably imposed awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of compensatory damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. And the same would be true for determinations of liability. By today's logic, every dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V CAMPBELL

538 U.S. 408 (2003)

Justice KENNEDY delivered the opinion of the Court.

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless

decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: "'You may want to put for sale signs on your property to get things moving.'" Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful death and tort actions. State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed. The Utah Supreme Court reinstated the $145 million punitive damages award.

II

We recognized in Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property."

In light of these concerns, in BMW v. Gore (1996) we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. Exacting appellate review ensures that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'"

III

Under the principles outlined in BMW of North America, Inc. v. Gore, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award. We address each guidepost of *Gore* in some detail.

A

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. This was, as well, an

explicit rationale of the trial court's decision in approving the award, though reduced from $145 million to $25 million.

A State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiff obtains.

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. For the reasons already stated, this argument is unconvincing. The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. While these ratios are not binding, they are instructive. They demonstrate

what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. The principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality.

C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." We note that, in the past, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

Justice SCALIA, dissenting.

I adhere to the view expressed in my dissenting opinion in BMW of North America, Inc. v. Gore (1996), that the Due Process Clause provides no substantive protections against "excessive" or "'unreasonable'" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from BMW v. Gore is insusceptible of principled application; accordingly, I do not feel justified in giving the case stare decisis effect. I would affirm the judgment of the Utah Supreme Court.

Justice THOMAS, dissenting.

I would affirm the judgment below because "I continue to believe that the Constitution does not constrain the size of punitive damages awards." Accordingly, I respectfully dissent.

Justice GINSBURG, dissenting.

Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages. In *Gore*, I stated why I resisted the Court's foray into punitive damages "territory traditionally within the States' domain." I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions under 28 U.S.C. §2254, the Court "work[s] at this business [of checking state courts] alone," unaided by the participation of federal district courts and courts of appeals. It was once recognized that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." I would adhere to that traditional view.

The large size of the award upheld by the Utah Supreme Court in this case indicates why damage-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its

judgment for that of Utah's competent decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP & R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a profit center." "[T]he Campbells presented considerable evidence," the trial court noted, documenting "that the PP & R program . . . has functioned, and continues to function, as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits."

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the weakest of the herd"—"the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value."

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, efforts that directly affected the Campbells. [W]hile the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting . . . in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past—in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents."

State Farm's "policies and practices," the trial evidence thus bore out, were "responsible for the injuries suffered by the Campbells," and the means used to implement those policies could be found "callous, clandestine, fraudulent, and dishonest." The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as "egregious and malicious."

When the Court first ventured to override state-court punitive damages awards, it did so moderately. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee." In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.

The Court returned to the issue of punitive damages in Philip Morris USA v. Williams, 556 U.S. 178 (2009). A jury awarded the widow of a smoker a damage award against a tobacco company of $800,000 in compensatory damages and $79.5 million in punitive damages. The Supreme Court held that this award violated due process because it punished the defendant for harms suffered by individuals other than the plaintiff. Justice Breyer, writing for the Court in a 5-4 decision, stated: "In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." This is a new substantive limit on punitive damages: They may be imposed only to punish a defendant for the harms suffered by that plaintiff and not for harms incurred by others who are not part of the litigation.

However, the Court said that a jury in considering the reprehensibility of a defendant's conduct may consider the extent of harm to third parties. The Court explained: "Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible — although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

Although conceptually such a distinction can be drawn, it is likely to cause serious confusion for juries. A jury cannot base its punitive damages on harm to third parties, but it may consider harm to third parties in assessing the reprehensibility of a defendant's conduct.

The Court remanded the case to the Oregon courts for reconsideration in light of its decision. The Oregon courts reaffirmed the entire punitive damage award, concluding that the defendant had not properly objected under state law requirements. The Supreme Court once more granted review, but then after oral argument dismissed the case as certiorari having been improvidently granted.

TOO MUCH DEFERENCE?

Notwithstanding the use of substantive due process in the punitive damage case presented above, not one law since 1937 has been declared unconstitutional by the Supreme Court as violating economic substantive due process. Ultimately, the question is whether this is appropriate judicial deference to legislative choices in regulating the

economy, or whether this constitutes judicial abdication of an important role in protecting economic liberties. Are the decisions since 1937 an overreaction to the *Lochner*-era decisions? Or do the decisions reflect a properly limited judicial role in scrutinizing economic regulations?

Answering these normative questions requires consideration of whether there should be constitutional protection of economic rights, such as freedom of contract and a right to practice a trade or profession. Also, there must be consideration of the proper judicial role and whether there are reasons why the judiciary should be especially deferential to legislatures in this area.

The bottom line is that since 1937 economic substantive due process has been unavailable to challenge government economic and social welfare laws and regulations. Protection of economic rights, since 1937, such that it has been, has come under two specific constitutional provisions: the Contracts Clause of Article I, §10, and the Takings Clause of the Fifth Amendment.

C. THE CONTRACTS CLAUSE

1. Introduction

Article I, §10 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." It is firmly established that this provision applies only if a state or local law interferes with existing contracts. In other words, the Contracts Clause does not apply to the federal government; challenges to federal interference with contracts must be brought under the Due Process Clause where they will receive the deferential rational basis review described above. Also, the Contracts Clause does not limit the ability of the government to regulate the terms of future contracts; it applies only if the state or local government is interfering with performance of already existing contracts.[23]

The Contracts Clause seems to have been motivated by a desire to prevent states from adopting laws to help debtors at the expense of creditors.[24] The framers were concerned that in times of recession or depression, state legislatures might adopt laws to protect debtors who were unable to pay what was owed. The Contracts Clause was meant to stop such debtor relief legislation that had the effect of interfering with contractual rights. The goal was not only to protect creditors, but also to encourage credit by assuring lenders that they would be repaid.

In the first half of the nineteenth century, the Court aggressively used the Contracts Clause to invalidate state and local laws that interfered with rights under existing contracts. Although the Contracts Clause continued to be used by the Court in the latter half of the nineteenth century, by the twentieth century the Contracts Clause rarely was mentioned in Supreme Court decisions. During the *Lochner* era, from about 1897 until 1937, the Contracts Clause was made superfluous by the Court's protection of freedom of contract under the Due Process Clauses of the Fifth and Fourteenth Amendments. The freedom of contract protected under these provisions limited both government regulation of future contracts and government interference with existing contracts. Because the Contracts Clause only applies to the latter, preventing impairment of

existing contracts, the Court's use of due process to protect freedom of contract subsumed the content of the Contracts Clause.

2. The Modern Use of the Contracts Clause

The modern era of Contracts Clause law began in 1934, even before the end of economic substantive due process. In Home Building & Loan Assn. v. Blaisdell, below, the Supreme Court upheld a Minnesota law, enacted in response to the Depression, that prevented mortgage holders from foreclosing on mortgages for a two-year period.

HOME BUILDING & LOAN ASSOCIATION v. BLAISDELL

290 U.S. 398 (1934)

Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of chapter 339 of the Laws of Minnesota of 1933, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, as being repugnant to the Contract Clause and the due process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution. The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act.

p. 620

We are here concerned with the provisions of part 1, authorizing the district court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," subject to the above-described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor "to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage . . . indebtedness at such times and in such manner" as shall be determined by the court.

The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered.

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. “Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.” The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency.

In the construction of the Contract Clause, the debates in the Constitutional Convention are of little aid. But the reasons which led to the adoption of that clause, and of the other prohibitions of section 10 of article 1, are not left in doubt, and have frequently been described with eloquent emphasis. The widespread distress following the revolutionary period and the plight of debtors had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened.

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end “has the result of modifying or abrogating contracts already in effect.” Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to

protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake.

The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And, if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget, that it is a *constitution* we are expounding" (McCulloch v. Maryland)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." When we are dealing with the words of the Constitution, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Applying the criteria established by our decisions, we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis.
2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.
3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.
4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the

mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

GOVERNMENT INTERFERENCE WITH PRIVATE CONTRACTS

The current law under the Contracts Clause distinguishes government interference with private contracts from government interference with its own contractual obligations. As to government interference with private contracts, the current test was articulated in Energy Reserves Group, Inc. v. Kansas Power & Light Co.

ENERGY RESERVES GROUP, INC. v. KANSAS POWER & LIGHT CO.

459 U.S. 400 (1983)

Justice BLACKMUN delivered the opinion of the Court.

This case concerns the regulation by the State of Kansas of the price of natural gas sold at wellhead in the intrastate market. It presents a federal Contract Clause issue. [A contract for natural gas provided that the price to be paid would be increased if government regulators fixed a higher price than that specified in the contract. Subsequently, Kansas adopted a law that provided that the price to be paid for natural gas under a contract could not be increased because of prices set by federal authorities. The state law prevented the natural gas producer from charging the higher prices that it was entitled to under the contract.]

Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people." Home Bldg. & Loan Ass'n v. Blaisdell (1934).

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Allied Structural Steel Co. v. Spannaus (1978). The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not

necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Hudson Water Co. v. McCarter (1908).

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Unless the State itself is a contracting party, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."

The threshold determination is whether the Kansas Act has impaired substantially ERG's contractual rights. Significant here is the fact that the parties are operating in a heavily regulated industry. State authority to regulate natural gas prices is well established. At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.

It is in this context that the indefinite escalator clauses at issue here are to be viewed. In drafting each of the contracts, the parties included a statement of intent, which made clear that the escalator clause was designed to guarantee price increases consistent with anticipated increases in the value of ERG's gas. The very existence of the governmental price escalator clause and the price redetermination clause indicates that the contracts were structured against the background of regulated gas prices. If deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act's adoption of the §109 ceiling.

Moreover, the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law. This latter provision could be interpreted to incorporate all future state price regulation, and thus dispose of the Contract Clause claim. Regardless of whether this interpretation is correct, the provision does suggest that ERG knew its contractual rights were subject to alteration by state price regulation. Price regulation existed and was foreseeable as the type of law that would alter contract obligations. Reading the Contract Clause as ERG does would mean that indefinite price escalator clauses could exempt ERG from any regulatory limitation of prices whatsoever. Such a result cannot be

permitted. In short, ERG's reasonable expectations have not been impaired by the Kansas Act.

To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes. Nor are the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas Legislature's judgment is entitled.

In other words, when a state or local government interferes with existing private contracts, a three-part test is used: (1) Is there a substantial impairment of a contractual relationship? (2) If so, does it serve a significant and legitimate public purpose? (3) If so, is it reasonably related to achieving the goal? The test is very similar to traditional rational basis review.

As to the first part of the test, whether there is a substantial impairment of the contract, in General Motors v. Romein, 503 U.S. 181 (1992), the Court rejected a challenge to a state law that changed the workers' compensation program on the ground that it did not interfere with existing contracts. In 1981, the Michigan Supreme Court interpreted a recently adopted Michigan statute to allow employers to reduce workers' compensation payments to disabled employees who could receive compensation from other employer-funded sources. In 1987, the Michigan legislature overturned this ruling by statute and required that employers make retroactive payments. Employers sued and said that the change in the law constituted an impairment of the obligation of contracts. The U.S. Supreme Court rejected this challenge. It concluded that there was "no contractual agreement regarding the specific workers' compensation terms allegedly at issue." The Court explained, "The 1987 statute did not change the legal enforceability of the employment contracts here. . . . Moreover, petitioners' suggestion that we should read every workplace regulation into the private contracted arrangements of employers and employees would expand the definition of contract so far that the constitutional provision would lose its anchoring purpose . . . [and i]nstead, the Clause would protect against all changes in legislation."

As to the second and third prongs of the test, state and local laws are upheld, even if they interfere with contractual rights, as long as they meet a rational basis test. Not surprisingly, virtually all laws have been found to meet this deferential scrutiny. For example, in El Paso v. Simmons, 379 U.S. 497 (1965), the Supreme Court upheld a state law that clearly changed the terms of a contract. Under a 1910 contract, Texas sold public lands. The contract provided that if interest was not paid in a timely fashion, the state could terminate the contract and reclaim the land. However, the contract said that an owner could reinstate a claim to the land by paying the delinquent interest owed. In 1941, Texas adopted a law saying that reinstatement had to occur within five years after there was a forfeiture for nonpayment.

The Supreme Court upheld the Texas law, even though it obviously limited the rights of landowners to reclaim land that had been forfeited. The Court said that the law had a

legitimate purpose in that it was intended "to restore confidence in the stability and integrity of land titles" and to end the "imbroglio over land titles in Texas." The Court found that the law was reasonably designed to achieve these goals and thus did not violate the Contracts Clause.

In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the Court found that a state law limiting coal mining impaired existing contracts, but nonetheless upheld the law because it served a significant government interest. A state law prohibited coal mining that would cause subsidence damage to property. The coal mine companies frequently had entered into agreements with those owning the surface rights, whereby the companies were allowed to mine, even if it caused subsidence of the land. In other words, the law prevented exactly what the coal miners had bargained to be able to do. Although the Court recognized that the law interfered with contractual rights, it upheld the law because it was a reasonable way to prevent or repair environmental damage caused by coal mining.

Most recently, in Sveen v. Melin, 138 S. Ct. 1815 (2018), the Court again declined to use the contracts clause to invalidate a state law. Minnesota revised its law and adopted a statute that provides that "the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual's former spouse." Under this statute, if one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation so that the insurance proceeds will instead go to the contingent beneficiary or the policyholder's estate upon his death. The law does this on the theory that the policyholder would want that result. But if he or she does not, the person may rename the ex-spouse as beneficiary.

Mark Sveen and Kaye Melin were married and Sveen named Melin as the primary beneficiary of his life insurance policy, while designating his two children from a prior marriage, Ashley and Antone Sveen, as the contingent beneficiaries. The Sveen-Melin marriage ended in 2007. The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations. In 2011, he passed away. Melin sued saying that the new Minnesota law violated the contracts clause of Article I, §10.

The Supreme Court, in an 8-1 decision, rejected this argument and upheld the Minnesota law. In an opinion by Justice Kagan, the Court said that the "statute does not substantially impair pre-existing contractual arrangements." The Court acknowledged that "the law makes a significant change," but said that it was not a substantial impairment of contract rights: "First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment."

There is only one case since 1934 where the Supreme Court has declared unconstitutional a state law that interfered with private contracts: Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). An Illinois company operated an office in Minnesota and provided a pension plan for its employees. The terms of the plan provided that the company could, at any time, amend the plan or terminate the plan and

distribute the assets to the employees. Employees were entitled to collect under the plan if they worked for the company until they reached age 65 and if the plan was in effect at that time. Minnesota adopted a Private Pension Benefits Protection Act that required employers to pay a "pension funding charge" if they terminated a pension plan or closed a Minnesota office. The charge was to ensure that pensions would be available for individuals when they reached retirement age. Allied Structural Steel closed its Minnesota facility and was assessed a $185,000 fee.

The Court found that the Minnesota law violated the Contracts Clause. Justice Potter Stewart, writing for the Court, began by declaring that the "Contract Clause remains part of the Constitution. It is not a dead letter." The Court found that the Minnesota statute was a substantial impairment of the obligation of contracts. The Court reasoned that the employer had a contract with its employees that permitted the termination of the contract at any point. The state, by forcing the company to make pension payments, was essentially abrogating this provision.

The Court said that the law was unconstitutional because it was not narrowly tailored emergency legislation like that in *Blaisdell*. Justice Stewart stated, "[T]his law can hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad society interest rather than a narrow class. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees, was not enacted to deal with a situation remotely approaching the broad and desperate economic conditions of the early 1930s. . . . [If] the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case."

Because *Allied Structural Steel* has not been followed by the Supreme Court in the last two decades, it is difficult to know whether it is an anomaly or whether it is a precedent that might someday be used to revitalize the Contracts Clause. Thus far, the Contracts Clause cases since *Allied Structural Steel* (presented and described above)—such as *Energy Reserves Group* and *Keystone Bituminous Coal*—have distinguished *Allied Structural Steel* and have refused to find a violation of the Contracts Clause.

GOVERNMENT INTERFERENCE WITH GOVERNMENT CONTRACTS

In United States Trust Co. v. New Jersey, the Supreme Court indicated that government interference with government contracts will be subjected to heightened scrutiny.

UNITED STATES TRUST CO. v. NEW JERSEY

431 U.S. 1 (1977)

[In 1962, New Jersey and New York adopted laws prohibiting the use of toll revenues from the Port Authority of New Jersey and New York from being used to subsidize railroad passenger service. The laws were meant to assure those holding Port Authority bonds that the toll funds would remain available to pay that debt. A decade later, during the energy crisis of the 1970s, the states adopted laws to repeal the earlier prohibition and to permit the use of toll funds to improve rail transit.]

Justice BLACKMUN delivered the opinion of the Court.

This case presents a challenge to a 1974 New Jersey statute as violative of the Contract Clause of the United States Constitution. That statute, together with a concurrent and parallel New York statute, repealed a statutory covenant made by the two States in 1962 that had limited the ability of The Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves.

We first examine appellant's general claim that repeal of the 1962 covenant impaired the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. Fletcher v. Peck (1810); Dartmouth College v. Woodward (1819). Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects. Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation.

In this case the obligation was itself created by a statute, the 1962 legislative covenant. It is unnecessary, however, to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation. The trial court found, and appellees do not deny, that the 1962 covenant constituted a contract between the two States and the holders of the Consolidated Bonds issued between 1962 and the 1973 prospective repeal. The intent to make a contract is clear from the statutory language: "The 2 States covenant and agree with each other and with the holders of any affected bonds. . . ." Moreover, as the chronology set forth above reveals, the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal. In return for their promise, the States received the benefit they bargained for: public marketability of Port Authority bonds to finance construction of the World Trade Center and acquisition of the Hudson & Manhattan Railroad. We therefore have no doubt that the 1962 covenant has been properly characterized as a contractual obligation of the two States.

It is not always unconstitutional, however, for changes in statutory remedies to affect pre-existing contracts. During the early years when the Contract Clause was regarded as an absolute bar to any impairment, this result was reached by treating remedies in a manner distinct from substantive contract obligations. Thus, for example, a State could abolish imprisonment for debt because elimination of this remedy did not impair the underlying obligation. Yet it was also recognized very early that the distinction between remedies and obligations was not absolute. Impairment of a remedy was held to be unconstitutional if it effectively reduced the value of substantive contract rights.

Although now largely an outdated formalism, the remedy/obligation distinction may be viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties. The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement. In this respect, the repeal of the 1962 covenant is to be seen as a serious disruption of the bondholders' expectations.

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements. Yet private contracts are not subject to unlimited modification under the police power. The Court in *Blaisdell* recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

When a State impairs the obligation of its own contract, the reserved powers doctrine has a different basis. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.

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The more specific justification offered for the repeal of the 1962 covenant was the States' plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.

The determination of necessity can be considered on two levels. First, it cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations on the use of Port Authority revenues and reserves to subsidize commuter railroads. Second, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Appellees contend, however, that choosing among these alternatives is a matter

for legislative discretion. But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.

We also cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances. [I]n the instant case the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. It was with full knowledge of these concerns that the 1962 covenant was adopted. Indeed, the covenant was specifically intended to protect the pledged revenues and reserves against the possibility that such concerns would lead the Port Authority into greater involvement in deficit mass transit.

During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances.

We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant.

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

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Decisions of this Court for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity. In short, those decisions established the principle that lawful exercises of a State's police powers stand paramount to private rights held under contract. Today's decision, in invalidating the New Jersey Legislature's 1974 repeal of its predecessor's 1962 covenant, rejects this previous understanding and remolds the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature. At the same time, by creating a constitutional safe haven for property rights embodied in a contract, the decision substantially distorts modern constitutional jurisprudence governing regulation of private economic interests. I might understand, though I could not accept, this revival of the Contract Clause were it in accordance with some coherent and constructive view of public policy. But elevation of the Clause to the status of regulator of the municipal bond market at the heavy price of frustration of sound legislative policymaking is as demonstrably unwise as it is unnecessary. The justification for today's decision, therefore, remains a mystery to me, and I respectfully dissent.

The Court's consideration of [the] actual background is, I believe, most unsatisfactory. The Court never explicitly takes issue with the core of New Jersey's defense of the repeal: that the State was faced with serious and growing environmental, energy, and

transportation problems, and the covenant worked at cross-purposes with efforts at remedying these concerns. Indeed, the Court candidly concedes that the State's purposes in effectuating the 1974 repeal were "admittedly important." Instead, the Court's analysis focuses upon related, but peripheral, matters.

Equally unconvincing is the Court's contention that repeal of the 1962 covenant was unreasonable because the environmental and energy concerns that prompted such action "were not unknown in 1962, and the subsequent changes were of degree and not of kind." Nowhere are we told why a state policy, no matter how responsive to the general welfare of its citizens, can be reasonable only if it confronts issues that previously were absolutely unforeseen.

The Court today dusts off the Contract Clause and thereby undermines the bipartisan policies of two States that manifestly seek to further the legitimate needs of their citizens. The Court's analysis, I submit, fundamentally misconceives the nature of the Contract Clause guarantee. One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. In accordance with this philosophy, the framers of our Constitution conceived of the Contract Clause primarily as protection for economic transactions entered into by purely private parties, rather than obligations involving the State itself. The framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

I would not want to be read as suggesting that the States should blithely proceed down the path of repudiating their obligations, financial or otherwise. Their credibility in the credit market obviously is highly dependent on exercising their vast lawmaking powers with self-restraint and discipline, and I, for one, have little doubt that few, if any, jurisdictions would choose to use their authority "so foolish[ly] as to kill a goose that lays golden eggs for them." But in the final analysis, there is no reason to doubt that appellant's financial welfare is being adequately policed by the political processes and the bond marketplace itself. The role to be played by the Constitution is at most a limited one. For this Court should have learned long ago that the Constitution be it through the Contract or Due Process Clause can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs. Because I consider the potential dangers of such judicial interference to be intolerable, I dissent.

The dispute between the majority and the dissent in United States Trust v. New Jersey is over whether the Contracts Clause should apply to government contracts and, if so, the appropriate test to be used. Although the Court did not articulate a level of scrutiny, its use of least restrictive alternative analysis and the word "necessary" seem clearly indicative of heightened scrutiny. Because there has not been another Supreme Court case since *United States Trust* concerning government interference with government contracts, the precise test remains uncertain. Nonetheless, it is clear that laws impairing

the government's obligations under its own contracts will be subjected to much more careful review than will laws interfering with private contracts.

D. THE TAKINGS CLAUSE

1. Introduction

Both the federal government and the states have the power of eminent domain; this is the authority to take private property when necessary for government activities. However, the Constitution contains an important limit on this power: The Fifth Amendment states, "[N]or shall private property be taken for public use without just compensation." This was the first provision of the Bill of Rights to be applied to the states.[25]

Analysis under the Takings Clause can be divided into four questions. First, is there a "taking"? As described below, there are two basic ways of finding a taking. A possessory taking occurs when the government confiscates or physically occupies property. Alternately, a regulatory taking is when government regulation leaves no reasonable economically viable use of property.

Second, is it "property"? Obviously, only if the object of the taking is "property" does the Fifth Amendment provision apply. Generally, the Court has relied on other sources of law, usually state law, in deciding whether there is a property interest.

Third, if there is a taking of property, the next question becomes: Is the taking for "public use"? If the taking is not for public use, the government must give the property back. However, as also is discussed below, the Court has very broadly defined public use so that almost any taking will meet the requirement. The Court has said that a taking is for public use as long as it is "rationally related to a conceivable public purpose";[26] in other words, a taking is for public use as long as it meets the rational basis test.

Fourth, assuming that it is a taking for public use, the final question becomes: Is "just compensation" paid? The key is that just compensation is measured in terms of the loss to the owner; the gain to the taker is irrelevant.

The Takings Clause is the most important protection of property rights in the Constitution. In part, the Takings Clause is about ensuring that the government does not confiscate the property of some to give it to others. Long ago, in Calder v. Bull, the Court condemned such a practice as violating the natural law principles on which the Constitution was founded.[27]

In part, too, the Takings Clause is about loss spreading. If the government takes away a person's property to benefit society, then society should pay. The Supreme Court has explained that a principal purpose of the Takings Clause is "to bar 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."[28]

Yet, as described below, very difficult questions arise in determining when the government incurs this obligation to pay just compensation. Almost any government regulation decreases the value of someone's property. The Court thus has long noted that "[g]overnment 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."[29] No bright-line test ever has been, or likely ever will be, formulated to determine when government actions that decrease the value of property become a taking. Indeed, the Court has admitted that it "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."[30] Rather, the Court has engaged in "ad hoc, factual inquiries" that turn "upon the particular circumstances in that case."[31] The result is a very large body of cases concerning the Takings Clause, but it often is difficult to find coherent principles to make sense of them.

2. Is There a "Taking"?

The vast majority of litigation concerning the Takings Clause of the Fifth Amendment has focused on the question: What is a "taking"? It is the obvious threshold issue for Takings Clause analysis because the constitutional provision applies only if a court finds that a taking has occurred.[32]

For the sake of clarity, two different types of takings can be identified, although the Supreme Court has not always used these categories and has not always consistently defined them. A "possessory" taking occurs when the government confiscates or physically occupies property. A "regulatory" taking occurs when the government's regulation leaves no reasonably economically viable use of the property.

POSSESSORY TAKINGS

The Supreme Court generally has found a taking when the government confiscates or physically occupies property: "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."[33] The following case is illustrative and discusses many of the most important Supreme Court decisions concerning possessory takings.

LORETTO v. TELEPROMPTER MANHATTAN CATV CORP.

458 U.S. 419 (1982)

Justice MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. Because we conclude that such a physical occupation of property is a taking, we reverse.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted §828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable." The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to §828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled.

The Court of Appeals determined that §828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.

We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

[T]he Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in Pumpelly v. Green Bay Co., this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In United States v. Causby (1946), the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such over flights to the quintessential form of a taking.

In short, when the "character of the governmental action," is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the extent of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

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

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins." Goldblatt v. Town of Hempstead (1962). In a curiously ana-chronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid per se takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine."

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that "States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails," the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships.

More recently, in Horne v. Department of Agriculture, the Court found that a federal program that required that raisin growers give a part of their crop to the federal government as part of ensuring price stability was a possessory taking. It does not matter whether the property is personal or real.

HORNE v. DEPARTMENT OF AGRICULTURE

135 S. Ct. 2419 (2015)

Chief Justice ROBERTS delivered the opinion of the Court.

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from imposing such a demand on the growers without just compensation.

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge. The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. In 2002-2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003-2004, 30 percent.

The Hornes—Marvin Horne, Laura Horne, and their family—are both raisin growers and handlers. They "handled" not only their own raisins but also those produced by other growers, paying those growers in full for all of their raisins, not just the free-tonnage portion. In 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so. The Government sent trucks to the Hornes' facility at eight o'clock one morning to pick up the raisins, but the Hornes refused entry. The Government then assessed against the Hornes a fine equal to the market value of the missing raisins—some $480,000—as well as an additional civil penalty of just over $200,000 for disobeying the order to turn them over.

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When the Government sought to collect the fine, the Hornes turned to the courts, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment.

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' applies only to real property and not to personal property." The answer is no.

There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation.

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins

passes to the Raisin Committee. The Committee's raisins must be physically segregated from free-tonnage raisins. Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."

REGULATORY TAKINGS

Assuming that the government has not confiscated or physically occupied property, under what circumstances may a taking be found because of government regulation? Government regulates property in countless ways, many of which diminish the value of property; which regulations are takings?

Traditionally, courts limited "takings" to situations where the government expropriated property or physically occupied it.[34] In the landmark case of Pennsylvania Coal Co. v. Mahon, the Court said that a taking also could be found if government regulation of the use of property went "too far."

PENNSYLVANIA COAL CO. v. MAHON

260 U.S. 393 (1922)

Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, commonly known there as the Kohler Act.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain

exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

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. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and Due Process Clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public.

The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are 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. As we already have said this is a question of degree—and therefore cannot be

disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Justice BRANDEIS, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . . subsidence of . . . any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

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Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The difficulty in deciding when government regulation constitutes a taking is illustrated by comparing Pennsylvania Coal v. Mahon to the following decision from a few years later, Miller v. Schoene, in which the Court found that a regulation was not a taking.

MILLER v. SCHOENE

276 U.S. 272 (1928)

Justice STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees

growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled.

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. Cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. It is communicated by spores from one to the other over a radius of at least two miles. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process.

The issue of when government regulation constitutes a taking remains important and difficult to this day. No formula exists. But the Court has articulated general criteria that should be considered in evaluating whether a regulation is a taking. For example, in Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986), the Court said:

> [W]e have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have "particular significance": (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action.

These criteria obviously accord courts a tremendous amount of discretion, and it is not surprising that cases concerning regulatory takings are often inconsistent and difficult to reconcile. As the criteria indicate, the Court especially focuses on the economic effect of the government regulations and the extent to which they interfere with the reasonable expectations of the property owner.

One important principle that emerges from the cases and that is crucial in judicial consideration of regulatory takings is that government regulation is a taking if it leaves no reasonable economically viable use of property; government regulation is not a taking simply because it decreases the value of a person's property, as long as it leaves reasonable economically viable uses.

Comparison of the following two Supreme Court cases illustrates this principle.

PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY

438 U.S. 104 (1978)

Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide 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 in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of

quality for today. “[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.”

B

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.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street’s intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

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Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to [the] proposals.

II

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,” 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. Indeed, we have frequently observed that whether a

particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

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.

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, see Euclid v. Ambler Realty Co. (1926) (prohibition of industrial use), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. Zoning laws generally do not affect existing uses of real property, 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).

p. 643

In contending that the New York City law has "taken" their property in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.

[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. [A]ppellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see Euclid v. Ambler Realty Co. (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian (1915) (87½ % diminution in value).

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

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. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

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 owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. 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.

Over 50 years ago, 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.

LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

505 U.S. 1003 (1992)

Justice SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. A state trial court found that this prohibition rendered Lucas's parcels "valueless." This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation."

p. 645

I

In the late 1970s, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. [U]nder the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. The Act provided no exceptions.

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete

extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.

[II]

Prior to Justice Holmes's exposition in Pennsylvania Coal Co. v. Mahon, it was generally thought that the Takings Clause reached only a "direct appropriation" of property, or the functional equivalent of a "practical ouster of [the owner's] possession." Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." Penn Central Transportation Co. v. New York City (1978). We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. Loretto v. Teleprompter Manhattan CATV Corp. (1982).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that "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," does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—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.

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[35]

The trial court found Lucas's two beachfront lots to have been rendered value-less by respondent's enforcement of the coastal-zone construction ban. Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, Board of Regents of State Colleges v. Roth (1972), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas.* As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation. . . ." Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

Justice BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse. The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that

this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case.

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle.

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation.

Ultimately even the Court cannot embrace the full implications of its per se rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law." Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.

The Court makes sweeping and, in my view, misguided and unsupported changes in our takings doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

An important area in which the Supreme Court frequently has considered regulatory takings is zoning ordinances. Zoning ordinances limit the way in which a person may use his or her property and therefore frequently have the effect of diminishing the property's economic value. Generally, though, the Court has refused to find a taking, concluding that the regulation does not eliminate all reasonable economically viable uses of the property.

Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926), was one of the first Supreme Court cases to consider a challenge to a zoning ordinance. A tract of vacant land was zoned for industrial uses and had a market value of about $10,000 per acre. The land was rezoned so that it could be used only for residential purposes, reducing its value to about $2,500 an acre. Nonetheless, the Supreme Court rejected a due process challenge to the revised zoning ordinance. The Court emphasized the government's strong police purpose in the zoning regulation. The Court said, "[T]he segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children."

Subsequent cases generally have followed this reasoning and have rejected takings challenges to zoning ordinances. For example, in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), a city's zoning ordinance prevented further excavation of a stone and gravel quarry that had been in operation for over 30 years. The Court rejected the takings claim and noted that "[i]t is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." The Court said that the zoning ordinance was not a taking because "there is no evidence . . . which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."

Similarly, in Agins v. City of Tiburon, 447 U.S. 255 (1980), the Supreme Court rejected a Takings Clause challenge to a zoning ordinance that required that property be used for single-family homes rather than multiple family dwellings. Whereas previously the owners might have constructed apartment or condominium buildings, the city of Tiburon adopted a zoning ordinance limiting construction to single-family homes. The effect of the ordinance was to substantially reduce the value of the property. But the Supreme Court concluded that there was not a taking because the owner still had reasonable economically viable use of the property and because of the government's important interest in "assuring careful and orderly development of residential property."

The Court has followed this reasoning in other cases where the government's regulation limits development or use of property. In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the Court refused to find a taking when a Pennsylvania law prevented mining that could cause subsidence of buildings, and a Pennsylvania agency required that 50 percent of the coal be kept in the land underneath structures. The law and the agency's interpretation of it had the effect of preventing some mining, even in instances where the coal company had purchased surface rights. Nonetheless, the Supreme Court found that there was not a taking. The Court quoted *Agins* as establishing that "land use regulation can effect a taking if it does not substantially advance legitimate state interests . . . or denies an owner economically viable use of land."

The *Keystone* Court concluded that there was not a taking because the law served legitimate state interests and because it allowed economically viable development of the property. The Court explained that the legislature's goal was to protect public safety by

preventing subsidence of land. The Court also observed that there was not a taking because the law did not eliminate all economically viable use of the property. The Court said, “When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners’ coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.”

All of these cases indicate that it is very difficult to persuade the Supreme Court that restrictions on the use of property, through zoning or other laws, constitute a taking. The Court only is willing to find a taking if the law prevents virtually all economically viable uses of the property, as was the situation in *Lucas*.

In Murr v. Wisconsin, 137 S. Ct. 1933 (2017), the issue was how to determine what is the property in deciding if there is a regulatory taking. A family owned two pieces of contiguous property in Wisconsin, but in different trusts. Zoning law prevented the development of one piece of property, but not the other. If they were considered distinct properties, then there would be a regulatory taking for the one where no development was allowed. But if it was all one piece of property, then it was not a regulatory taking because reasonable economically viable use was possible for the whole property.

In a 5-3 decision, the Court ruled in favor of the government and found that it should be regarded as one piece of property. Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, said that a multi-factor test should be applied in determining the nature of the property for purposes of the takings clause. The Court wrote: “[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.”

Chief Justice Roberts dissented, joined by Justices Thomas and Alito, and argued that the focus should be solely on how state law defines the property. He wrote: “State law defines the boundaries of distinct parcels of land, and those boundaries should determine the ‘private property’ at issue in regulatory takings cases.”

The above cases concerned the issue of when government prohibitions or restrictions on the use of property constitute a taking. By contrast, what if the government allows the development of property, but subjects it to specific conditions that the developer must meet? When are government conditions on development considered a taking?

In three decisions, the Supreme Court has announced that a condition on the development of property is a taking if the burden imposed by the condition is not roughly proportionate to the government’s justification for regulating.

NOLLAN v. CALIFORNIA COASTAL COMMN., 483 U.S. 825 (1987): Justice Scalia wrote the opinion for the Court. [The government had conditioned a permit for the

development of beachfront property on the owners' granting the public an easement to cross the property for beach access.] Had California simply required the [appellants] to make an easement across their beachfront property available to the public on a permanent basis . . . we have no doubt that there would have been a taking. We think a "permanent physical occupation" has occurred . . . where individuals are given a permanent and continuous right to pass to and from, so that real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

[The Court said that the police power allows the government to place a condition on development if it is rationally related to preventing harms caused by the new construction. For example, the government could put conditions on the development of beachfront property to protect the use of the beach from the effects of the new building. But the Court said that there is a taking if] the condition . . . utterly fails to further the end advanced as the justification. . . . In short, unless the permit condition serves the same governmental purposes as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.

The Court clarified *Nollan* in Dolan v. City of Tigard.

DOLAN v. CITY OF TIGARD

512 U.S. 374 (1994)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. We granted certiorari to resolve a question left open by our decision in Nollan v. California Coastal Comm'n (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan. The city also

adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. [T]he Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property.

II

One of the principal purposes of the Takings Clause 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). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in Village of Euclid v. Ambler Realty Co. (1926). "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). A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Agins v. City of Tiburon (1980).

In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions.

III

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan.* If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

a

We addressed the essential nexus question in *Nollan.* The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. The public easement was designed to connect two public beaches that were separated by the Nollans' property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "'an out-and-out plan of extortion.'"

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers.

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]."

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." [The Court remanded the case for the application of the standard that it announced.]

Justice STEVENS, with whom Justice BLACKMUN and Justice GINSBURG join, dissenting.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run

contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

The exactions associated with the development of a retail business are a species of business regulation that heretofore warranted a strong presumption of constitutional validity. The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." Dolan, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to exclude from an evaluation the benefit to be derived from the permit to enlarge the store and the parking lot.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning,"—even twice avowing that "[n]o precise mathematical calculation is required,"—are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings," and make "individualized determination[s]" with respect to the nature and the extent of the relationship between the conditions and the impact, but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

The Court's most recent case considering when conditions on development constitute a taking involved a situation where, unlike in *Nollan* and *Dolan*, the permit for development was denied. In other words, in *Nollan* and *Dolan*, the property owner went ahead with the development and then argued that the conditions were a taking, while in Koontz v.

St. Johns River Water Management District, 570 U.S. 595 (2013), the property owner chose not to get a permit for development but nonetheless to challenge the conditions as a taking.

Coy Koontz wanted to develop some of his property on wetlands in Florida. He was told by the St. Johns River Water Management District that he could do this only if he (1) reduced the size of his development and deeded to the District a conservation easement on the resulting larger remainder of his property or (2) hired contractors to make improvements to District-owned wetlands several miles away. Rather than do either of these, he brought a lawsuit arguing that these conditions constituted a taking.

The Court, in a 5-4 decision with Justice Alito writing for the majority, ruled in favor of Koontz. There were two parts to the Court's holding. First, the Court held that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so."

Second, the Court said that it was a taking even though the government gave Koontz the option of spending money rather than providing an easement on his property. The Court said that "[s]uch so-called 'in lieu of' fees are utterly commonplace and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."

Justice Kagan wrote for the four dissenters and expressed concern that there will not be a way to distinguish between impermissible land use exactions and property taxes. She expressed concern that the Court's holding "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny." She explained: "By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. . . . And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly."

In subsequent years, the Supreme Court has considered two additional questions concerning regulatory takings. First, can a property owner bring a takings challenge to regulations that already were in place when the property was acquired? Palazzolo v. Rhode Island, below, addresses this question. Second, is temporarily denying an owner development of the property a taking? Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, presented later, addresses this question.

PALAZZOLO v. RHODE ISLAND

Justice KENNEDY delivered the opinion of the Court.

Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner's development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment. Petitioner sought review in this Court, contending the Supreme Court of Rhode Island erred in rejecting his takings claim.

I

The town of Westerly is on an edge of the Rhode Island coastline. In 1959 petitioner, a lifelong Westerly resident, decided to invest in three undeveloped, adjoining parcels. To purchase and hold the property, petitioner and associates formed Shore Gardens, Inc. (SGI). After SGI purchased the property petitioner bought out his associates and became the sole shareholder. In the first decade of SGI's ownership of the property the corporation submitted a plat to the town subdividing the property into 80 lots; and it engaged in various transactions that left it with 74 lots, which together encompassed about 20 acres. During the same period SGI also made initial attempts to develop the property and submitted intermittent applications to state agencies to fill substantial portions of the parcel. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill—as much as six feet in some places—before significant structures could be built. SGI's proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers (DHR), sought to dredge from Winnapaug Pond and fill the entire property. The application was denied for lack of essential information.

A second, similar proposal followed a year later. A third application, submitted in 1966 while the second application was pending, proposed more limited filling of the land for use as a private beach club. These latter two applications were referred to the Rhode Island Department of Natural Resources, which indicated initial assent. The agency later withdrew approval, however, citing adverse environmental impacts. SGI did not contest the ruling.

No further attempts to develop the property were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State's coastal properties. Regulations promulgated by the Council designated salt marshes like those on SGI's property as protected "coastal wetlands." Second, in 1978 SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder.

In 1983 petitioner, now the owner, renewed the efforts to develop the property. An application to the Council, resembling the 1962 submission, requested permission to

construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marsh land area. The Council rejected the application, noting it was "vague and inadequate for a project of this size and nature." The agency also found that "the proposed alteration . . . will conflict with the Coastal Resources Management Plan presently in effect." Petitioner did not appeal the agency's determination.

Petitioner went back to the drawing board, this time hiring counsel and preparing a more specific and limited proposal for use of the property. The new application, submitted to the Council in 1985, echoed the 1966 request to build a private beach club. The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate "50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles."

The application fared no better with the Council than previous ones. In a short opinion the Council said the beach club proposal conflicted with the regulatory standard for a special exception. To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." This time petitioner appealed the decision to the Rhode Island courts, challenging the Council's conclusion as contrary to principles of state administrative law. The Council's decision was affirmed.

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council's action deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under Lucas v. South Carolina Coastal Council (1992). He sought damages in the amount of $3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision. After a bench trial, a justice of the Superior Court ruled against petitioner, accepting some of the State's theories. The Rhode Island Supreme Court affirmed. Like the Superior Court, the State Supreme Court recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central.*

II

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government

encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. Loretto v. Teleprompter Manhattan CATV Corp. (1982). In Pennsylvania Coal Co. v. Mahon (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."

Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent 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."

p. 659

When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use and to the *Penn Central* claim. [The state court's] holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be

the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not by asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value."

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle."

Justice STEVENS, concurring in part and dissenting in part.

I

If a regulating body fails to adhere to its procedural or substantive obligations in developing land use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action if the application of such restriction to a

property owner would cause her a "direct and substantial injury." It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the state is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner.

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery.

II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted. To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time, in my judgment it is pellucidly clear that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired. His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner "is deemed to have notice of an earlier-enacted restriction." If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred.

Of course, if, as respondent contends, even the prior owner never had any right to fill wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone "too far," petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.

When is a moratorium on development a taking?

TAHOE-SIERRA PRESERVATION COUNCIL, INC. v. TAHOE REGIONAL PLANNING AGENCY

535 U.S. 302 (2002)

Justice STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32-month period, a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. All agree that Lake Tahoe is "uniquely beautiful," that President Clinton was right to call it a "'national treasure that must be protected and preserved,'" and that Mark Twain aptly described the clarity of its waters as "'not merely transparent, but dazzlingly, brilliantly so.'" Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the "'noble sheet of blue water'" beloved by Twain and countless others. As the District Court found, "[d]ramatic decreases in clarity first began to be noted in the 1950's/early 1960's, shortly after development at the lake began in earnest." The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

The upsurge of development in the area has caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development." Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity."

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered "high hazard" lands. Moreover, certain areas near streams or wetlands known as "Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem . . . is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff," conservation efforts have focused on controlling growth in these high hazard areas.

In combination, Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for

32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case.

II

Approximately two months after the adoption of the 1984 Plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe Sierra Preservation Council, a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of the 1980 Compact, primarily for the purpose of constructing "at a time of their choosing" a single-family home "to serve as a permanent, retirement or vacation residence." When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building."

III

Petitioners make only a facial attack on Ordinance 81-5 and Resolution 83-21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they "face an uphill battle," Keystone Bituminous Coal Assn. v. DeBenedictis (1987), that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no mater how brief—of all economically viable use to trigger a per se rule that a taking has occurred.

In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "[t]he temptation to adopt what amount to per se rules in either direction," we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

IV

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is

characterized by “essentially ad hoc, factual inquiries,” designed to allow “careful examination and weighing of all the relevant circumstances.”

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, United States v. Pewee Coal Co. (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp. (1982); or when its planes use private airspace to approach a government airport, United States v. Causby (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, Block v. Hirsh (1921); that bans certain private uses of a portion of an owner’s property, Village of Euclid v. Ambler Realty Co., (1926); Keystone Bituminous Coal Assn. v. DeBenedictis (1987); or that forbids the private use of certain airspace, Penn Central Transp. Co. v. New York City (1978), does not constitute a categorical taking. “The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.”

“This case does not present the ‘classi[c] taking’ in which the government directly appropriates private property for its own use”; instead the interference with property rights “arises from some public program adjusting the benefits. . . .” Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in Lucas v. South Carolina Coastal Council (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here.

[W]e have “generally eschewed” any set formula for determining how far is too far, choosing instead to engage in “‘essentially ad hoc, factual inquiries.’” Indeed, we still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine “a number of factors” rather than a simple “mathematically precise” formula. Justice Brennan’s opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on “the parcel as a whole.”

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.” The emphasis on the word “no” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in *Penn Central.*

Certainly, our holding that the permanent “obliteration of the value” of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation

prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question.

V

[T]he ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by [a] categorical rule or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, "[g]overnment 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." A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.

More importantly, we are persuaded that the better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances." Our polestar remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine.

[W]e have eschewed "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." The outcome instead "depends largely 'upon the particular circumstances [in that] case.'"

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before

a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay. Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel. In the proceedings involving the Lake Tahoe Basin, for example, the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations. Since a categorical rule tied to the length of deliberations would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process. Moreover, with a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear "reciprocity of advantage," because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." In fact, there is reason to believe property values often will continue to increase despite a moratorium. Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to per se rules in either direction must be resisted." There may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court's opinion illustrates, petitioners' proposed rule is simply "too blunt an instrument," for identifying those cases. We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

For over half a decade petitioners were prohibited from building homes, or any other structures, on their land. Because the Takings Clause requires the government to pay

compensation when it deprives owners of all economically viable use of their land, see Lucas v. South Carolina Coastal Council (1992), and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent.

I

"A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." In failing to undertake this inquiry, the Court ignores much of the impact of respondent's conduct on petitioners. Instead, it relies on the flawed determination of the Court of Appeals that the relevant time period lasted only from August 1981 until April 1984. During that period, Ordinance 81-5 and Regulation 83-21 prohibited development pending the adoption of a new regional land-use plan. The adoption of the 1984 Regional Plan (hereinafter Plan or 1984 Plan) did not, however, change anything from the petitioners' standpoint. After the adoption of the 1984 Plan, petitioners still could make no use of their land. Because respondent caused petitioners' inability to use their land from 1981 through 1987, that is the appropriate period of time from which to consider their takings claim.

II

I now turn to determining whether a ban on all economic development lasting almost six years is a taking. *Lucas* reaffirmed our "frequently expressed" view that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." The District Court in this case held that the ordinances and resolutions in effect between August 24, 1981, and April 25, 1984, "did in fact deny the plaintiffs all economically viable use of their land." The Court of Appeals did not overturn this finding. And the 1984 injunction, issued because the environmental thresholds issued by respondent did not permit the development of single-family residences, forced petitioners to leave their land economically idle for at least another three years. The Court does not dispute that petitioners were forced to leave their land economically idle during this period. But the Court refuses to apply *Lucas* on the ground that the deprivation was "temporary."

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between "temporary" and "permanent" prohibitions is tenuous. The "temporary" prohibition in this case that the Court finds is not a taking lasted almost six years. The "permanent" prohibition that the Court held to be a taking in *Lucas* lasted less than two years. Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."

More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be

at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." The regulation in *Lucas* was the "practical equivalence" of a long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation.

Lucas is implicated when the government deprives a landowner of "all economically beneficial or productive use of land." The District Court found, and the Court agrees, that the moratorium "temporarily" deprived petitioners of "'all economically viable use of their land.'" Because the rationale for the *Lucas* rule applies just as strongly in this case, the "temporary" denial of all viable use of land for six years is a taking.

III

When a regulation merely delays a final land use decision, we have recognized that there are other background principles of state property law that prevent the delay from being deemed a taking. We thus noted in *First English* that our discussion of temporary takings did not apply "in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." Thus, the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations.

But a moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law. Moratoria are "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of building permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change."

Because the prohibition on development of nearly six years in this case cannot be said to resemble any "implied limitation" of state property law, it is a taking that requires compensation.

Lake Tahoe is a national treasure and I do not doubt that respondent's efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens. Justice Holmes' admonition of 80 years ago again rings true: "We are 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."

3. Is It for "Public Use"?

The Fifth Amendment authorizes the government only to take private property for "public use." If the taking were deemed to be for private use, the taking would be invalidated and the government would have to return the power to the owner. The Supreme Court often has declared that "one person's property may not be taken for the benefit of

another private person without a justifying public purpose, even though compensation be paid."[36] The framers' obvious concern was that the government might use its eminent domain power to play Robin Hood and take from some private owners and give to others.

However, the Supreme Court has expansively defined "public use" so that virtually any taking will meet the requirement. The Court has held that it is a taking for public use so long as the government acts out of a reasonable belief that the taking will benefit the public. The Court reaffirmed this in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

The State of Hawaii was concerned that so much land was owned by a relatively few people, a result of Hawaii's precolonial property system, which restricted ownership to the islands' chiefs and nobility. The state therefore used its eminent domain power to take the property, with just compensation, and with the plan of selling ownership to a much larger number of people. The owners were furious and argued that the government was impermissibly taking from some private owners to give to others.

The Supreme Court unanimously found that this was a taking for public use. The Court reviewed Berman v. Parker and said that it establishes the proposition that "[t]he public use requirement is thus coterminous with the scope of a sovereign's police powers." The Court emphasized the need for great deference to the legislature in deciding whether a taking is for public use. Justice O'Connor, writing for the Court, said: "[T]he Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation."

The Court was explicit that a taking is for public use so long as the government meets the rational basis test. The Court declared: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." The Court concluded that Hawaii's action was for public use because it acted out of a reasonable belief that distributing ownership among a larger number of people would benefit the public.

Subsequently, and much more controversially, this issue arose in Kelo v. City of New London.

KELO v. CITY OF NEW LONDON

545 U.S. 469 (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

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These 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. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process.

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 in the 90-acre area, 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.

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. 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.

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.” 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. Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as “public purpose.”

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., in which most of the housing for the area’s 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing. 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 Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.” The public use underlying the taking was unequivocally affirmed.

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 upon condemnation 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. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. 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. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

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.

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."

In affirming the City's authority to take petitioners' properties, we 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. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

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, as long as it is "rationally related to a conceivable public purpose." Hawaii Housing Authority 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.

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. Here, the trial court conducted a careful and extensive inquiry.

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 city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*. The identity 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, Justice Scalia, and Justice Thomas join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote: "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." Calder v. Bull (1798).

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.

The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Where is the line between "public" and "private" property use? 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.

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not.

Here New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

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 aesthetic 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.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given

condemnation, the effect is the same from the constitutional perspective—private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade—not downgrade—property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

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."

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Defying this understanding, the Court replaces the Public Use Clause with a "[P]ublic [P]urpose" Clause (or perhaps the "Diverse and Always Evolving Needs of Society" Clause), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational." This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'Connor powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion.

Regrettably, however, the Court's error runs deeper than this. 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.

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it 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.

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. (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. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak.

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.

Kelo engendered great controversy. Almost every state adopted a law limiting the ability of the government to take private property to sell it to a developer. Some state supreme courts held that doing so violated the state constitutions. For example, in Norwood v. Horney, 111 Ohio St. 3d 353, 853 N.E.2d 1115 (2006), the Ohio Supreme Court held, under the Ohio Constitution, a city could not take private property and transfer it to a developer as part of urban renewal of deteriorating property.

4. What Is the Requirement for "Just Compensation"?

The Constitution clearly envisions that the government will take private property for public use, but it requires that the government pay for it. The standard of payment is "just compensation."

The Supreme Court has consistently ruled that just compensation is measured in terms of the loss to the owner; the gain to the taker is irrelevant. Long ago, Justice Oliver Wendell Holmes declared that the measure is "what has the owner lost, not what has the taker gained."[37]

The Supreme Court has said that the loss should be valued in terms of the market value to the owner,[38] as of the time of the taking.[39] However, the government does not need to pay for an increase in the market value that occurred solely because of its plan to take the property.[40]

If there is a taking, the property owner can bring a legal action against the government to receive just compensation. One form of action is an "inverse condemnation suit," where an individual claims that a government action constitutes a taking. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), the Supreme Court held that even if the government ceases its regulation in response to an inverse condemnation suit, the government nonetheless must pay damages for the time, however temporary, that it had taken the private property. In other words, the Court held that the government is required to pay just compensation for the entire time of its action, including the period before the judicial adjudication that it was a taking. The Court said that "[i]nvalidation of the ordinance . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause." Rather, the government must pay just compensation when there is a taking, even if it is a temporary taking.

The Court considered how "just compensation" is determined in the following case.

BROWN v. LEGAL FOUNDATION OF WASHINGTON

538 U.S. 216 (2003)

Justice STEVENS delivered the opinion of the Court.

The State of Washington, like every other State in the Union, uses interest on lawyers' trust accounts (IOLTA) to pay for legal services provided to the needy. Some IOLTA programs were created by statute, but in Washington, as in most other States, the IOLTA program was established by the State Supreme Court pursuant to its authority to regulate the practice of law. In Phillips v. Washington Legal Foundation (1998), a case involving the Texas IOLTA program, we held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." We did not, however, express any opinion on the question whether the income had been "taken" by the State or "as to the amount of 'just compensation,' if any, due respondents." Ibid. We now confront those questions.

I

[I]n the course of their legal practice, attorneys are frequently required to hold clients' funds for various lengths of time. It has long been recognized that they have a professional and fiduciary obligation to avoid commingling their clients' money with their own, but it is not unethical to pool several clients' funds in a single trust account. Before 1980 client funds were typically held in non-interest-bearing federally insured checking

accounts. Because federal banking regulations in effect since the Great Depression prohibited banks from paying interest on checking accounts, the value of the use of the clients' money in such accounts inured to the banking institutions. In 1980, Congress authorized federally insured banks to pay interest on a limited category of demand deposits referred to as "NOW accounts."

In response to the change in federal law, Florida adopted the first IOLTA program in 1981 authorizing the use of NOW accounts for the deposit of client funds, and providing that all of the interest on such accounts be used for charitable purposes. Every State in the Nation and the District of Columbia have followed Florida's lead and adopted an IOLTA program, either through their legislatures or their highest courts. The result is that, whereas before 1980 the banks retained the value of the use of the money deposited in non-interest-bearing client trust accounts, today, because of the adoption of IOLTA programs, that value is transferred to charitable entities providing legal services for the poor. The aggregate value of those contributions in 2001 apparently exceeded $200 million.

[The Washington] court described the four essential features of its IOLTA program: (a) the requirement that all client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes.

The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. [T]he "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases. Most frequently cited is Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained." Boston Chamber of Commerce v. Boston (1910).

Applying the teaching of these cases to the question before us, it is clear that neither Brown nor Hayes is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain. For that reason, both the majority and the dissenters on the Court of Appeals agreed that if petitioners' net loss was zero, the compensation that is due is also zero.[41]

The Rules adopted and administered by the Washington Supreme Court unambiguously require lawyers to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. Thus, if the [lawyers] deposited petitioners' money in IOLTA accounts could have generated net income, the [lawyers] violated the court's Rules. Any conceivable net loss to petitioners was the consequence of the [lawyers'] incorrect private decisions rather than any state action. Such mistakes may well give petitioners a valid claim against the [lawyers], but they would provide no support for a claim for compensation from the State, or from any of the respondents.

To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a per se taking requiring the payment of "just compensation" to the client. Because that compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice KENNEDY, and Justice THOMAS join, dissenting.

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no "net loss" because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken. What is more, the Court embraces a line of reasoning that we explicitly rejected in Phillips v. Washington Legal Foundation (1998). Our precedents compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers' trust accounts (IOLTA).

When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated. In holding that any just compensation that might be owed is zero, the Court neither pretends to ascertain the market value of the confiscated property nor asserts that the case falls within one of the two exceptions where market value need not be determined. Instead, the Court proclaims that just compensation is to be determined by the former property owner's "net loss," and endorses simultaneously two competing and irreconcilable theories of how that loss should be measured. The Court proclaims its agreement with the Ninth Circuit majority that just compensation is the interest petitioners would have earned had their funds been deposited in non-IOLTA accounts. At the same time, the Court approves the view of the Ninth Circuit dissenters that just compensation is the amount of interest actually earned in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves. The Court cannot have it both ways—as the Ninth Circuit itself realized.

Under the Court's first theory, just compensation is zero because, under the State Supreme Court's Rules, the only funds placed in IOLTA accounts are those which could not have earned net interest for the client in a non-IOLTA savings account. This approach defines petitioners' "net loss" as the amount of interest they would have received had their funds been deposited in separate, non-IOLTA accounts. This definition of just compensation has no foundation in reason. Once interest is earned on petitioners' funds held in IOLTA accounts, that money is petitioners' property. It is at that point that the State appropriates the interest to fund LFW—after the interest has been generated in the pooled accounts—and it is at that point that just compensation for the taking must be assessed. It may very well be, as the Court asserts, that petitioners could

not have earned money on their funds absent IOLTA's mandatory pooling arrangements, but just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist. When the State takes possession of petitioners' property—petitioners' money—and transfers it to LFW, the property obviously has value. The conclusion that it is devoid of value because of the circumstances giving rise to its creation is indefensible.

The Court's rival theory for explaining why just compensation is zero fares no better. Contrary to its aforementioned description of petitioners' "net loss" as the amount their funds would have earned in non-IOLTA accounts, the Court declares that just compensation is "the *net value* of the interest that was *actually earned* by petitioners"—net value consisting of the value of the funds, *less* "transaction and administrative costs and bank fees" that would be expended in extracting the funds from the IOLTA accounts. To support this concept of "net value," the Court cites nothing but the cases discussed earlier in its opinion, which establish that just compensation consists of the value the owner has lost rather than the value the government has gained. In this case, however, there is no difference between the two. Petitioners have lost the interest that Phillips says rightfully belongs to them—which is precisely what the government has gained. The Court's apparent fear that following the Constitution in this case will provide petitioners a "windfall" in the amount of transaction costs saved is based on the unfounded assumption that the State must return the interest directly to petitioners. The State could satisfy its obligation to pay just compensation by simply returning petitioners' money to the IOLTA account from which it was seized, leaving others to incur the accounting costs in the event petitioners seek to extract their interest from the account.

While the Court is correct that under the State's IOLTA rules, petitioners' funds could not have earned net interest in separate, that has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts. The Court today arbitrarily forecloses clients from recovering the "net interest" to which (even under the Court's definition of just compensation) they are entitled. What is more, there is no reason to believe that petitioners themselves do not fall within the class of clients whose funds, though unable to earn interest in non-IOLTA accounts, nevertheless generate "net interest" in IOLTA accounts. That is why the Ninth Circuit dissenters (who shared the Court's second theory of just compensation but not the first) voted to remand to the District Court for a factual determination of what the "net value" of petitioners' interest actually is.

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous. The Court's judgment that petitioners are not entitled to the market value of their confiscated property has no basis in law.

Notes

1 Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

2 *See, e.g.*, Forrest McDonald, *We the People: The Economic Origins of the Constitution* (1958).

3 Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

4 The label comes from the decision in Lochner v. New York, 198 U.S. 45 (1905) (invalidating a maximum hours law for bakers), which is regarded as a paradigm case in the era. *Lochner* is presented below.

5 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). These cases are presented in section C of this chapter.

6 59 U.S. (18 How.) 272 (1855).

7 The *Slaughter-House Cases* are presented in detail in Chapter 5.

8 83 U.S. (16 Wall.) at 81.

9 A widely cited work advocating this view was Herbert Spencer, *Social Statics* (1851).

10 Leading proponents of this view were Thomas M. Cooley, *Constitutional Limitations* (1878), and Christopher G. Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* (1886).

11 Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U.S. 418, 458 (1890).

12 Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394 (1886).

13 Benjamin F. Wright, *The Growth of American Constitutional Law* 154 (1942) (159 Supreme Court cases found state laws to violate due process and equal protection; 25 more were found to violate due process and another constitutional provision). It should be remembered that the Court's commitment to laissez-faire economics also caused it to invalidate federal economic regulations as exceeding the scope of the Commerce Clause or as violating the Tenth Amendment (discussed in Chapter 2).

14 Tyson & Brother v. Banton, 273 U.S. 418 (1927).

15 Ribnik v. McBride, 277 U.S. 350 (1928).

16 Williams v. Standard Oil Co., 278 U.S. 235 (1929).

17 94 U.S. 113 (1876), discussed above. In some cases, the Court did uphold price regulations. *See* Block v. Hirsh, 256 U.S. 135 (1921) (price controls for rental housing); German Alliance Insurance Co. v. Lewis, 233 U.S. 389 (1914) (price controls for fire insurance).

18 *See, e.g.*, Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943 (1927);

Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 Harv. L. Rev. 545 (1924). For a discussion of the importance of legal realist writings in undermining the intellectual foundations of Lochnerism, *see* Howard Gillman, *The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

19 Laurence Tribe, *American Constitutional Law* 579 (2d ed. 1988).

20 The Court-packing plan and the reactions to it are discussed in Chapter 2.

21 These cases are discussed in Chapter 2.

22 [Footnote 4 in the Court's opinion] There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon; on restraints upon the dissemination of information, see Near v. Minnesota; on interferences with political organizations, see Stromberg v. California; as to prohibition of peaceable assembly, see De Jonge v. Oregon.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters; or racial minorities, Nixon v. Herndon; 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; South Carolina State Highway Department v. Barnwell Bros.

23 See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

24 Benjamin Wright, *The Growth of American Constitutional Law* 41 (1967).

25 See Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897).

26 Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

27 3 U.S. (3 Dall.) 386 (1798).

28 Armstrong v. United States, 364 U.S. 40, 49 (1960).

29 Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922).

30 Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

31 *Id.* at 124 (citations omitted).

32 There also is the question of when a takings claim becomes "ripe" for review. Ripeness, a requirement for a federal court to hear a case, is discussed in Chapter 1. In Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), the Court held that a lawsuit challenging a taking was not ripe until after state administrative and judicial remedies were exhausted; it could not be said that a state had taken private property without just compensation if there were still mechanisms for the state to provide this. But in Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162 (2019), the Court overruled *Williamson County*, and held that a takings claim is ripe as soon as the taking occurs.

33 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

34 *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 668-669 (1887) (concluding that a state's prohibition of alcoholic beverages was not a taking and declaring that "a prohibition . . . upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit").

35 Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers in land's full value." This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. Penn Central Transportation Co. v. New York City (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations. [Footnote by the Court.]

36 Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937); *see also* Cincinnati v. Vester, 281 U.S. 439, 447 (1930); Missouri Pacific Railway Co. v. Nebraska, 164 U.S. 403, 416 (1896).

37 Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

38 *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).

39 *See* Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984).

40 *See, e.g.*, United States v. Fuller, 409 U.S. 488 (1973).

41 Justice Scalia is mistaken in stating that we hold that just compensation is measured by the amount of interest "petitioners would have earned had their funds been deposited in non-IOLTA accounts." We hold (1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington. *See* IOLTA Adoption Order (1984) ("IOLTA funds are only those funds that cannot, under any circumstances, earn net interest [after deducting transaction and administrative costs and bank fees] for the client"). [Footnote by the Court.]

Equal Protection

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A. INTRODUCTION

1. Constitutional Provisions Concerning Equal Protection

The Constitution as originally drafted and ratified had no provisions assuring equal protection of the laws. This, of course, is not surprising for a document written for a society where blacks were enslaved and where women were routinely discriminated against. After the Civil War, widespread discrimination against former slaves led to the passage of the Fourteenth Amendment, which provides in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The promise of this provision went unrealized for almost a century as the Supreme Court rarely found any state or local action to violate the Equal Protection Clause until the mid-1950s. Indeed, Justice Oliver Wendell Holmes derisively referred to the provision as "the last resort of constitutional arguments."[1] Holmes probably was referring to the possibility of challenging almost any law as discriminating against someone and to the Court's consistent reluctance to use the Equal Protection Clause to invalidate state or local laws.

Brown v. Board of Education, 347 U.S. 483 (1954), ushered in the modern era of equal protection jurisprudence. Since *Brown*, the Supreme Court has relied on the Equal Protection Clause as a key provision for combatting invidious discrimination and for safeguarding fundamental rights.

There remains no provision in the Constitution that says that the federal government cannot deny equal protection of the laws. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown v. Board of Education that concerned the segregation of the District of Columbia public schools, the Court held that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment.

Obviously, it would be unacceptable to allow the federal government to discriminate based on race or gender in a manner prohibited the states by the Fourteenth Amendment. To avoid this embarrassment, the Court interpreted the Fifth Amendment as including an implicit requirement for equal protection. The Court simply declared that "discrimination may be so unjustifiable as to be violative of due process."

It is now well settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment. The Supreme Court has expressly declared that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[2] But technically, equal protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment.

2. A Framework for Equal Protection Analysis

All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose? Many government laws draw a distinction among people and thus are potentially susceptible to an equal protection challenge. For example, those under age 16 might claim to be discriminated against by the age requirement for obtaining a driver's license, and those denied government benefits might argue that they are discriminated against by eligibility guidelines. If these laws, or any government actions, are challenged based on equal protection, the issue is whether the government can identify a sufficiently important objective for its discrimination.

What constitutes a sufficient justification depends entirely on the type of discrimination. For instance, the Supreme Court has declared that it is extremely suspicious of race discrimination, and therefore the government may use racial classifications only if it proves that they are necessary to achieve a compelling government purpose. This is known as "strict scrutiny." In contrast, a 14-year-old who claimed that the denial of a driver's license violated equal protection would prevail only by proving that the law was not rationally related to a legitimate government purpose. This is known as "rational basis" review.

To be more specific, all equal protection issues can be broken down into three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?

QUESTION 1: WHAT IS THE CLASSIFICATION?

The first question is what is the government's classification? How is the government drawing a distinction among people? Equal protection analysis always must begin by identifying how the government is distinguishing among people. Sometimes this is clear; sometimes it is the focus of the litigation.

As described below, there are two basic ways of establishing a classification. One is where the classification exists on the face of the law—that is, where the law in its very terms draws a distinction among people based on a particular characteristic. For example, a law that prohibits blacks from serving on juries is an obvious facial racial classification.[3] Likewise, a law that says that only those 16 and older can have drivers' licenses is obviously a facial classification.

Alternatively, sometimes laws are facially neutral, but there is a discriminatory impact to the law or discriminatory effects from its administration. For instance, a law that requires that all police officers be at least 5′10″ tall and 150 pounds is, on its face, only a

height and weight classification. Statistics, however, show that over 40 percent of men but only 2 percent of women will meet this requirement. The result is that the law has a discriminatory impact against women in hiring for the police force.

As described below, the Supreme Court has made it clear that discriminatory impact is insufficient to prove a racial or gender classification. If a law is facially neutral, demonstrating a race or gender classification requires proof that there is a discriminatory purpose behind the law.[4] Thus, women challenging the height and weight requirements for the police force must show that the government's purpose was to discriminate based on gender.

In other words, there are two alternative ways of proving the existence of a classification: showing that it exists on the face of the law or demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose.

QUESTION 2: WHAT IS THE APPROPRIATE LEVEL OF SCRUTINY?

Once the classification is identified, the next step in analysis is to identify the level of scrutiny to be applied. The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.

Discrimination based on race or national origin is subjected to strict scrutiny. Also, generally, discrimination against aliens is subjected to strict scrutiny, although there are several exceptions where less than strict scrutiny is used. Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative. The government has the burden of proof under strict scrutiny and the law will be upheld only if the government persuades the court that it is necessary to achieve a compelling purpose. Strict scrutiny is usually fatal to the challenged law.[5]

Intermediate scrutiny is used for discrimination based on gender and for discrimination against nonmarital children. Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose.[6] In other words, the Court need not find that the government's purpose is "compelling," but it must characterize the objective as "important." The means used need not be necessary, but must have a "substantial relationship" to the end being sought. Under intermediate scrutiny, the government has the burden of proof. The Supreme Court explained that the "burden of justification is demanding and that it rests entirely on the state."[7]

Finally, there is the rational basis test. Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test. Under rational basis review a law will be upheld if it is rationally related to a legitimate government purpose.[8] The government's objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need be a rational way to accomplish the end.

The challenger has the burden of proof under rational basis review. The rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review.[9]

How has the Court decided which level of scrutiny to use for particular classifications? Although the Court has shown little willingness in the past two decades to subject additional classifications to strict or intermediate scrutiny, how will it evaluate such requests? Several criteria are applied in determining the level of scrutiny.

For example, the Court has emphasized that immutable characteristics—like race, national origin, gender, and the marital status of one's parents—warrant heightened scrutiny.[10] The notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.

The Court also considers the ability of the group to protect itself through the political process. Women, for example, are more than half the population, but traditionally have been severely underrepresented in political offices. Aliens do not have the ability to vote and thus the political process cannot be trusted to represent their interests.[11]

The history of discrimination against the group also is relevant to the Court in determining the level of scrutiny. A related issue is the Court's judgment concerning the likelihood that the classification reflects prejudice as opposed to a permissible government purpose.[12] For example, the Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action. In contrast, the Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to be instances where sex is a justifiable basis for discrimination.

Although the levels of scrutiny are firmly established in constitutional law and especially in equal protection analysis, there are many who criticize the rigid tiers of review. For example, Justices Thurgood Marshall and John Paul Stevens, among others, have argued that there should be a sliding scale of review rather than the three levels of scrutiny.[13] They maintain that the Court should consider such factors as the constitutional and social importance of the interests adversely affected and the invidiousness of the basis on which the classification was drawn. They contend that under the rigid tiers of review the choice of the level of scrutiny is usually decisive and unduly limits the scope of judicial analysis. Those who favor a sliding scale believe that it would lead to more candid discussion of the competing interests and therefore provide overall better decision making.

Some critics suggest that although the Court speaks in terms of three tiers of review, in reality there is a spectrum of standards of review.[14] The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more "bite" than the customarily deferential rational basis review. Similarly, it is argued that in some cases intermediate scrutiny is applied in a very deferential manner that is essentially rational basis review, while in other cases intermediate scrutiny seems indistinguishable from strict scrutiny. The argument is that although the Court articulates three tiers of review, the reality is a range of standards. In reading the cases below, it is

useful to consider whether the Court's definitions and applications of the levels of scrutiny have been consistent, or whether the Court has varied in this regard to achieve the results it desires.

QUESTION 3: DOES THE GOVERNMENT ACTION MEET THE LEVEL OF SCRUTINY?

The level of scrutiny is the rule of law that is applied to the particular government action being challenged as denying equal protection. In evaluating the constitutionality of a law, the Court evaluates both the law's ends and its means. For strict scrutiny, the end must be deemed compelling for the law to be upheld; for intermediate scrutiny, the end has to be regarded as important; and for the rational basis test, there just has to be a legitimate purpose.

In evaluating the relationship of the means of the particular law to the end, the Supreme Court often focuses on the degree to which a law is underinclusive and/or overinclusive.[15] A law is underinclusive if it does not apply to individuals who are similar to those to whom the law applies. For example, a law that excludes those under age 16 from having drivers' licenses is somewhat overinclusive because some younger drivers undoubtedly have the physical ability and the emotional maturity to be effective drivers.

A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose. In other words, the law unnecessarily applies to a group of people. For example, the government's decision to evacuate and intern all Japanese Americans on the West Coast during World War II was radically overinclusive.[16] Although the government's purported interest was in preventing espionage, individuals were evacuated and interned without any determination of their threat. Obviously, the law was enormously overinclusive because it harmed a large number of people unnecessarily.

A law can be both underinclusive and overinclusive. The decision to evacuate Japanese Americans during World War II was certainly both. If the goal was to isolate those who were a threat to security, interning only Japanese Americans was underinclusive in that it did not identify those of other races who posed a danger. At the same time, as explained above, the federal government's action was extremely overinclusive because few, if any, Japanese Americans posed any threat. In fact, not a single Japanese American during World War II was ever charged with espionage.[17]

The fact that a law is underinclusive and/or overinclusive does not mean that it is sure to be invalidated. Quite the contrary, virtually all laws are underinclusive, overinclusive, or both. The Court has recognized that laws often are underinclusive because the government may choose to proceed "one step at a time." But underinclusiveness and overinclusiveness are used by courts in evaluating the fit between the government's means and its ends. If strict scrutiny is used, a relatively close fit is required; in fact, the government will have to show that the means are necessary—the least restrictive alternative—to achieve the goal. Under intermediate scrutiny, a closer fit will be required and less underinclusiveness or overinclusiveness will be permitted than under the rational basis test.

Thus, equal protection analysis involves three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny? Cases posing an equal protection issue always involve a dispute over one or more of these questions.[18]

THE PROTECTION OF FUNDAMENTAL RIGHTS UNDER EQUAL PROTECTION

Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics, such as race, gender, age, disability, or other traits. Sometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right.

An early case using equal protection in this way was Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).[19] The Oklahoma Habitual Criminal Sterilization Act required surgical sterilization for individuals who had been convicted three or more times for crimes involving "moral turpitude." The Supreme Court declared the law unconstitutional as violating equal protection because it discriminated among people in their ability to exercise a fundamental liberty: the right to procreate. Justice William Douglas, writing for the Court, said, "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 other words, the Court found that the right to procreate was a fundamental right and essentially used strict scrutiny under the Equal Protection Clause to analyze the government's discrimination. The Court has used the Equal Protection Clause to protect other fundamental rights such as voting,[20] access to the judicial process,[21] and interstate travel.[22] The use of equal protection to safeguard these fundamental rights was, in part, based on the Supreme Court's desire to avoid substantive due process, which had all of the negative connotations of the *Lochner* era. However, the effect is the same whether a right is deemed fundamental under the Equal Protection Clause or under the Due Process Clause: Government infringements are subjected to strict scrutiny.

Chapter 8 discusses fundamental rights, including both those that the Court has protected under the Equal Protection Clause and those safeguarded under due process. For example, the cases on marriage equality for gays and lesbians, which have focused on both equal protection and due process, are presented in the next chapter. This chapter focuses on the use of equal protection to analyze discrimination among people based on traits such as race, gender, alienage, legitimacy, age, disability, wealth, and sexual orientation.

B. THE RATIONAL BASIS TEST

1. Introduction

The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet. In other words, unless the government action is a type of discrimination that warrants the application of intermediate or strict scrutiny, rational basis review is used. Although the Court has phrased the test in

different ways over time,[23] the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose. For instance, in New Orleans v. Dukes, 427 U.S. 297 (1976), and in many other cases, the Court said that the Equal Protection Clause is satisfied as long as the classification is "rationally related to a legitimate state interest." Also, the Court has been consistent that the challenger has the burden of proof when rational basis review is applied. There is a strong presumption in favor of laws that are challenged under the rational basis test.[24]

The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. As discussed below, the Court often has said that a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government's actual purpose. The result is that it is rare for the Supreme Court to find that a law fails the rational basis test.

This raises important questions. First, is this appropriate deference to the legislative process or undue judicial abdication? Since 1937, the Court has made it clear that it will defer to government economic and social regulations unless they infringe on a fundamental right or discriminate against a group that warrants special judicial protection.[25] This can be defended as proper judicial restraint, as the Court allows the more democratic branches of government to make decisions except in areas where there is reason for heightened judicial scrutiny.[26] Legislation often involves arbitrary choices favoring some over others, and judicial deference leaves these decisions to the political process.

But it also can be argued that the Court has gone too far in its deference under the rational basis test. Unfair laws are allowed to stand because a conceivable legitimate purpose can be identified for virtually any law. Frequently these are laws enacted to help a particular group with political clout at the expense of others who are less politically powerful.

Another underlying issue in considering the rational basis test is whether the Court has been consistent in applying it. Although in general the Court has been enormously deferential, there have been several cases where laws have been declared unconstitutional under rational basis review. For example, in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Court used rational basis review to invalidate a zoning ordinance that prevented the operation of a home for the mentally disabled. In Romer v. Evans, 517 U.S. 620 (1996), the Court found that a voter initiative in Colorado that repealed laws prohibiting discrimination based on sexual orientation and that precluded the adoption of new protections failed rational basis review.

Many argue that the Court in these cases applied a different, more rigorous version of the rational basis test—one with "bite."[27] The claim is that there is not a singular rational basis test but one that varies between complete deference and substantial rigor. On the other hand, it might be argued that the test is consistent and that the Court is simply deciding that certain laws lack a legitimate purpose or are so arbitrary as to be unreasonable. In considering the cases below, it is important to assess whether there is a singular rational basis test or differences in the test applied by the Court depending on the results it wants to achieve.

In examining a law under rational basis review, there are two questions: Does the law have a legitimate purpose? Is the law rationally related to achieving it? Each of these issues is discussed in turn.

2. Does the Law Have a Legitimate Purpose?

In assessing whether there is a legitimate purpose for a law, there are two interrelated questions. What constitutes a "legitimate" purpose? How should it be decided whether there is such a purpose present—must it be the actual purpose behind the law, or is it enough that such a purpose is conceivable?

WHAT CONSTITUTES A LEGITIMATE PURPOSE?

At the least, the government has a legitimate purpose if it advances a traditional "police" purpose: protecting safety, public health, or public morals. Public safety, public health, and public morals are legitimate government purposes, but they are not the only ones. Virtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test. As the Supreme Court declared in Berman v. Parker, "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."[28] For example, in New Orleans v. Dukes, 427 U.S. 297 (1976), the Supreme Court upheld an ordinance that banned all pushcart food vendors in the French Quarter, except those who had continuously operated there for eight or more years. The Court accepted the city's claim that "street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors . . . might thus have a deleterious effect on the economy of the city." The Court said that the distinction among vendors based on their length of work in the French Quarter was legitimate because "[t]he city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation."

Only rarely has the Court found that a government purpose was not legitimate under the rational basis test. Romer v. Evans is likely the most important such decision.

ROMER v. EVANS

517 U.S. 620 (1996)

Justice KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Plessy v. Ferguson (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

I

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination based on sexual orientation in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

II

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The critical discussion of the amendment is as follows:

> The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. . . . The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.

Sweeping and comprehensive is the change in legal status effected by this law. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. Amendment 2 bars

homosexuals from securing protection against the injuries that public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

[T]he amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

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. See New Orleans v. Dukes (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity). Williamson v. Lee Optical of Okla., Inc. (1955) (assumed health concerns justified law favoring optometrists over opticians). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to

an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

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.

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. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Department of Agriculture v. Moreno (1973).

Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . ." *Civil Rights Cases*.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick (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.

The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the State Constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection.

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 it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct.

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. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.

In United States v. Windsor, 570 U.S. 714 (2013), and Obergefell v. Hodges, 135 S. Ct. 2584 (2015), the Court struck down, respectively, a provision of the federal Defense of Marriage Act and laws in four states prohibiting same-sex marriage. In both cases the Court found that the laws violated equal protection because of their discrimination based on sexual orientation. In neither case did the Court indicate the level of scrutiny it was using. Both cases are presented in Chapter 8 in connection with the discussion of the right to marry.

MUST IT BE THE ACTUAL PURPOSE, OR IS A CONCEIVABLE PURPOSE ENOUGH?

The Court's enormous judicial deference under the rational basis test is, in part, because of its willingness to accept any conceivable legitimate purpose as sufficient, even if it was not the government's actual purpose. In other words, a law will be upheld as long as the government's lawyer can identify some conceivable legitimate purpose, regardless of whether that was the government's actual motivation. The Court has declared that under rational basis review the actual purpose behind a law is irrelevant and the law must be upheld "if any state of facts reasonably may be conceived to justify" its discrimination.[29]

A key issue is whether any conceivable legitimate purpose should be sufficient or whether the courts should insist on a legitimate actual purpose. The Supreme Court has clearly held that under rational basis review the former, any conceivable legitimate purpose, is sufficient. An example of this is in U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), in which the Supreme Court upheld a federal law designed to prevent retired railroad workers from receiving benefits under both the Social Security system and the railroad retirement system. The law allowed those who were already retired and receiving dual benefits to continue to get them, but those who were still employed could not get dual benefits unless they had worked for the railroads for 25 years. The result was that a person who had worked 10 years for the railroads and was already retired could get dual benefits, but a person who had worked for 24 years and was still employed could not collect dual benefits.

In upholding the law, the Court said, “Where, as here, there are plausible reasons for Congress’s action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlies the legislative decision because this Court never has insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing.” The Court accepted the government’s claim that the Congress could have believed that those who had acquired a statutory entitlement to dual benefits while still employed in the railroad industry “had a greater equitable claim to those benefits than [those] who were no longer in railroad employment when they became eligible for dual benefits.”

Subsequently, in Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307 (1993), the Court reaffirmed that any conceivable legislative purpose is sufficient and even went so far as to say that “those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it.” The case involved a challenge to a provision of the Federal Cable Communications Policy Act of 1984 that created an exemption to certain regulations for cable television facilities that serve one or more buildings under common ownership or operation. Justice Clarence Thomas, writing for the Court, said, “[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Justice Stevens, in a concurring opinion, lamented that “[j]udicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.”

This issue—whether any conceivable legitimate purpose is sufficient or whether it must be the actual purpose—is crucial in determining the impact of rational basis review. If any conceivable purpose is sufficient, very few laws will fail the rational basis test. Government lawyers can invent some legitimate conceivable purpose for virtually every law. The critics argue that rational basis review is meaningful only if the Court limits itself to looking at the actual purpose for a law.

On the other hand, those who defend the Supreme Court point out that rarely is there a single, identifiable purpose for a law. Legislators might have radically different reasons for supporting a specific legislative act. Justice Rehnquist once remarked that actual purpose review “assumes that individual legislators are motivated by one discernable actual purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons.”[30] Moreover, once a law is struck down for lack of an adequate actual purpose, Congress simply could reenact the law and assert a permissible goal.

Ultimately, the issue is over how much “bite” there should be in the rational basis test. Allowing any conceivable legitimate purpose to suffice makes the rational basis test a rule of almost complete deference to the government. Limiting the judiciary to considering only the actual purpose behind a law would dramatically increase the chance that laws would be struck down under rational basis review.

3. The Requirement for a “Reasonable Relationship”

Under rational basis review, the Court also must decide "whether the classifications drawn in a statute are reasonable in light of its purpose."[31] However, the Court repeatedly has expressed that this is "the most relaxed and tolerant form of judicial scrutiny."[32] Thus, the Court has said that under the rational basis test, laws will be upheld unless the government's action is "clearly wrong, a display of arbitrary power, not an exercise of judgment."[33] As a result, under the rational basis test, the Court will allow laws that are both significantly underinclusive and overinclusive.

TOLERANCE FOR UNDERINCLUSIVENESS UNDER RATIONAL BASIS REVIEW

As described above, laws are underinclusive when they do not regulate all who are similarly situated. Underinclusive laws raise the concern that the government has enacted a law that targets a particular politically powerless group or that exempts those with more political clout. But the Supreme Court has said that when rational basis review is used, even substantial underinclusiveness is allowed, because the government "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[34] The following decision is a classic case used to illustrate the Court's willingness to tolerate underinclusiveness under rational basis review. Notice especially Justice Jackson's concurring opinion, which offers one of the clearest arguments for meaningful rational basis review under equal protection.

RAILWAY EXPRESS AGENCY, INC. v. NEW YORK

336 U.S. 106 (1949)

Justice DOUGLAS delivered the opinion of the Court.

Section 124 of the Traffic Regulations of the City of New York promulgated by the Police Commissioner provides: "No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Appellant is engaged in a nation-wide express business. It operates about 1,900 trucks in New York City and sells the space on the exterior sides of these trucks for advertising. That advertising is for the most part unconnected with its own business. It was convicted in the magistrates court and fined.

The question of equal protection of the laws is pressed strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to

the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

Justice JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the Due Process Clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider to create hazards, annoyances or discomforts to their inhabitants.

The burden should rest heavily upon one who would persuade us to use the Due Process Clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government— state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the Equal Protection Clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to

discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

This case affords an illustration. Even casual observations from the sidewalks of New York will show that an ordinance which would forbid all advertising on vehicles would run into conflict with many interests, including some, if not all, of the great metropolitan newspapers, which use that advertising extensively. Their blandishment of the latest sensations is not less a cause of diverted attention and traffic hazard than the commonplace cigarette advertisement which this truck-owner is forbidden to display. But any regulation applicable to all such advertising would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few. I do not mention this to criticize the motives of those who enacted this ordinance, but it dramatizes the point that we are much more likely to find arbitrariness in the regulation of the few than of the many. Hence, for my part, I am more receptive to attack on local ordinances for denial of equal protection than for denial of due process, while the Court has more often used the latter clause.

It is urged with considerable force that this local regulation does not comply with the Equal Protection Clause because it applies unequally upon classes whose differentiation is in no way relevant to the objects of the regulation. As a matter of principle and in view of my attitude toward the Equal Protection Clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The Equal Protection Clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.

TOLERANCE FOR OVERINCLUSIVENESS UNDER RATIONAL BASIS REVIEW

Likewise, even substantial overinclusiveness is tolerated under rational basis review. A law is overinclusive if it regulates individuals who are not similarly situated; that is, if it covers more people than it needs to in order to accomplish its purpose. Overinclusive laws are unfair to those who are unnecessarily regulated and they risk “burden[ing] a politically powerless group which would have been spared if it had enough clout to compel normal attention to the relevant costs and benefits.”[35]

Nonetheless, the Supreme Court has indicated that even significant overinclusiveness is allowed under rational basis review. New York City Transit Authority v. Beazer is an important illustration in this regard. It also indicates that laws that are both significantly underinclusive and overinclusive often are upheld under rational basis review.

NEW YORK CITY TRANSIT AUTHORITY v. BEAZER

440 U.S. 568 (1979)

Justice STEVENS delivered the opinion of the Court.

The New York City Transit Authority refuses to employ persons who use methadone. The District Court found that this policy violates the Equal Protection Clause of the Fourteenth Amendment. We now reverse.

I

About 40,000 persons receive methadone maintenance treatment in New York City, of whom about 26,000 participate in the five major public or semipublic programs, and 14,000 are involved in about 25 private programs. The sole purpose of all these programs is to treat the addiction of persons who have been using heroin for at least two years.

The evidence indicates that methadone is an effective cure for the physical aspects of heroin addiction. The crucial indicator of successful methadone maintenance is the patient's abstinence from the illegal or excessive use of drugs and alcohol. The District Court found that the risk of reversion to drug or alcohol abuse declines dramatically after the first few months of treatment. Indeed, "the strong majority" of patients who have been on methadone maintenance for at least a year are free from illicit drug use. But a significant number are not. On this critical point, the evidence relied upon by the District Court reveals that even among participants with more than 12 months' tenure in methadone maintenance programs, the incidence of drug and alcohol abuse may often approach and even exceed 25%.

This litigation was brought by the four respondents as a class action on behalf of all persons who have been, or would in the future be, subject to discharge or rejection as employees of TA by reason of participation in a methadone maintenance program.

II

In this case, the Transit Authority's rule places a meaningful restriction on all of its employees and job applicants; in that sense the rule is one of general applicability and satisfies the equal protection principle without further inquiry. The District Court, however, interpreted the rule as applicable to the limited class of persons who regularly use narcotic drugs, including methadone. As so interpreted, we are necessarily confronted with the question whether the rule reflects an impermissible bias against a special class.

Respondents have never questioned the validity of a special rule for all users of narcotics. Rather, they originally contended that persons receiving methadone should not be covered by that rule; in other words, they should not be included within a class that is otherwise unobjectionable. Their constitutional claim was that methadone users are entitled to be treated like most other employees and applicants rather than like other users of narcotics. But the District Court's findings unequivocally establish that there are

relevant differences between persons using methadone regularly and persons who use no narcotics of any kind.

In addition, a substantial percentage of persons taking methadone will not successfully complete the treatment program. The findings do not indicate with any precision the number who drop out, or the number who can fairly be classified as unemployable, but the evidence indicates that it may well be a majority of those taking methadone at any given time.

Respondents no longer question the need, or at least the justification, for special rules for methadone users. Indeed, they vigorously defend the District Court's opinion which expressly held that it would be permissible for the Transit Authority ["TA"] to have a special rule denying methadone users any employment unless they had been undergoing treatment for at least a year, and another special rule denying even the most senior and reliable methadone users any of the more dangerous jobs in the system.

But any special rule short of total exclusion that TA might adopt is likely to be less precise—and will assuredly be more costly—than the one that it currently enforces. If eligibility is marked at any intermediate point—whether after one year of treatment or later—the classification will inevitably discriminate between employees or applicants equally or almost equally apt to achieve full recovery. Even the District Court's opinion did not rigidly specify one year as a constitutionally mandated measure of the period of treatment that guarantees full recovery from drug addiction. The uncertainties associated with the rehabilitation of heroin addicts precluded it from identifying any bright line marking the point at which the risk of regression ends. By contrast, the "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

The dissent is therefore repeatedly mistaken in attributing to the District Court a finding that TA's "normal screening process without additional effort" would suffice in the absence of the "no drugs" rule. Aggravating this erroneous factual assumption is a mistaken legal proposition advanced by the dissent— that TA can be faulted for failing to prove the unemployability of "successfully maintained methadone users." Aside from the misallocation of the burden of proof that underlies this argument, it is important to note that TA did prove that 20% to 30% of the class afforded relief by the District Court are not "successfully maintained," and hence are assuredly not employable. Even assuming therefore that the percentage of employable persons in the remaining 70% is the same as that in the class of TA applicants who do not use methadone, it is respondents who must be faulted for failing to prove that the offending 30% could be excluded as cheaply and effectively in the absence of the rule.

At its simplest, the District Court's conclusion was that TA's rule is broader than necessary to exclude those methadone users who are not actually qualified to work for TA. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like TA to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of

personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause. As the District Court recognized, the special classification created by TA's rule serves the general objectives of safety and efficiency. Moreover, the exclusionary line challenged by respondents "is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice . . . made by that branch of Government vested with the power to make such choices."

Because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole.

No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision.

Justice WHITE, with whom Justice MARSHALL joins, dissenting.

The District Court found that the evidence conclusively established that petitioners exclude from employment all persons who are successfully on methadone maintenance —that is, those who after one year are "free of the use of heroin, other illicit drugs, and problem drinking," those who have graduated from methadone programs and remain drug free for less than five years; that past or present successful methadone maintenance is not a meaningful predictor of poor performance or conduct in most job categories; that petitioners could use their normal employee-screening mechanisms to separate the successfully maintained users from the unsuccessful; and that petitioners do exactly that for other groups that common sense indicates might also be suspect employees. Petitioners did not challenge these factual conclusions in the Court of Appeals, but that court nonetheless reviewed the evidence and found that it overwhelmingly supported the District Court's findings.

It bears repeating, then, that both the District Court and the Court of Appeals found that those who have been maintained on methadone for at least a year and who are free from the use of illicit drugs and alcohol can easily be identified through normal personnel procedures and, for a great many jobs, are as employable as and present no more risk than applicants from the general population.

The question before us is the rationality of placing successfully maintained or recently cured persons in the same category as those just attempting to escape heroin addiction or who have failed to escape it, rather than in with the general population. The asserted justification for the challenged classification is the objective of a capable and reliable work force, and thus the characteristic in question is employability. "Employability," in this regard, does not mean that any particular applicant, much less every member of a given group of applicants, will turn out to be a model worker. Nor does it mean that no such applicant will ever become or be discovered to be a malingerer, thief, alcoholic, or even heroin addict. All employers take such risks. Employability, as the District Court used it in reference to successfully maintained methadone users, means only that the employer is

no more likely to find a member of that group to be an unsatisfactory employee than he would an employee chosen from the general population.

Petitioners had every opportunity, but presented nothing to negative the employability of successfully maintained methadone users as distinguished from those who were unsuccessful. Instead, petitioners, like the Court, dwell on the methadone failures—those who quit the programs or who remain but turn to illicit drug use. The Court, for instance, makes much of the drug use of many of those in methadone programs, including those who have been in such programs for more than one year. But this has little force since those persons are not "successful," can be and have been identified as such, and, despite the Court's efforts to put them there, are not within the protection of the District Court's injunction. That 20% to 30% are unsuccessful after one year in a methadone program tells us nothing about the employability of the successful group, and it is the latter category of applicants that the District Court and the Court of Appeals held to be unconstitutionally burdened by the blanket rule disqualifying them from employment.

Finally, even were the District Court wrong, and even were successfully maintained persons marginally less employable than the average applicant, the blanket exclusion of only these people, when but a few are actually unemployable and when many other groups have varying numbers of unemployable members, is arbitrary and unconstitutional. Many persons now suffer from or may again suffer from some handicap related to employability. But petitioners have singled out respondents—unlike ex-offenders, former alcoholics and mental patients, diabetics, epileptics, and those currently using tranquilizers, for example—for sacrifice to this at best ethereal and likely nonexistent risk of increased unemployability. Such an arbitrary assignment of burdens among classes that are similarly situated with respect to the proffered objectives is the type of invidious choice forbidden by the Equal Protection Clause.

CASES IN WHICH LAWS ARE DEEMED ARBITRARY AND UNREASONABLE

Occasionally, the Supreme Court has found laws to be so arbitrary and unreasonable as to fail rational basis review. The following two decisions are examples of this. In examining these cases, consider whether the Court is applying the same deferential review as in the above decisions or whether it is a different rational basis test with more "bite."

U.S. DEPARTMENT OF AGRICULTURE v. MORENO

413 U.S. 528 (1973)

Justice BRENNAN delivered the opinion of the Court.

This case requires us to consider the constitutionality of §3(e) of the Food Stamp Act of 1964, which, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member

of the household. In practical effect, §3(e) creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance.

I

The federal food stamp program was established in 1964 in an effort to alleviate hunger and malnutrition among the more needy segments of our society. Eligibility for participation in the program is determined on a household rather than an individual basis. An eligible household purchases sufficient food stamps to provide that household with a nutritionally adequate diet. The household pays for the stamps at a reduced rate based upon its size and cumulative income. The food stamps are then used to purchase food at retail stores, and the Government redeems the stamps at face value, thereby paying the difference between the actual cost of the food and the amount paid by the household for the stamps.

As initially enacted, §3(e) defined a "household" as "a group of related or non-related individuals, who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." In January 1971, however Congress redefined the term "household" so as to include only groups of related individuals. Pursuant to this amendment, the Secretary of Agriculture promulgated regulations rendering ineligible for participation in the program any "household" whose members are not "all related to each other."

Appellees in this case consist of several groups of individuals who allege that, although they satisfy the income eligibility requirements for federal food assistance, they have nevertheless been excluded from the program solely because the persons in each group are not "all related to each other." Appellee Jacinta Moreno, for example is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's three children. They share common living expenses, and Mrs. Sanchez helps to care for appellee. Appellee's monthly income, derived from public assistance, is $75; Mrs. Sanchez receives $133 per month from public assistance. The household pays $135 per month for rent, gas and electricity, of which appellee pays $50. Appellee spends $10 per month for transportation to a hospital for regular visits, and $5 per month for laundry. That leaves her $10 per month for food and other necessities. Despite her poverty, appellee has been denied federal food assistance solely because she is unrelated to the other members of her household. Moreover, although Mrs. Sanchez and her three children were permitted to purchase $108 worth of food stamps per month for $18, their participation in the program will be terminated if appellee Moreno continues to live with them.

II

Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest. The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, "[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to

stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements."

Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional "declaration of policy." Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment of §3(e). The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H.R. Conf. Rep. No. 91—1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

Although apparently conceding this point, the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program. In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households we still could not agree with the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions, wholly independent of §3(e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, the Act renders ineligible for assistance any household containing "an able-bodied adult person between the ages of eighteen and sixty-five" who fails to register for, and accept, offered employment. Similarly, [the Act] specifically impose[s] strict criminal penalties upon any individual who obtains or uses food stamps fraudulently. The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses.

Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. [I]n practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are "likely to abuse the program," but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Traditional equal protection analysis does not require that every classification be drawn with precise "mathematical nicety." But the classification here in issue is not only "imprecise," it is wholly without any rational basis.

Justice REHNQUIST, with whom THE CHIEF JUSTICE concurs, dissenting.

Here appellees challenged a provision in the Federal Food Stamp Act which limited food stamps to related people living in one "household." The result of this provision is that unrelated persons who live under the same roof and pool their resources may not obtain food stamps even though otherwise eligible.

The Court's opinion would make a very persuasive congressional committee report arguing against the adoption of the limitation in question. Undoubtedly, Congress attacked the problem with a rather blunt instrument and, just as undoubtedly, persuasive arguments may be made that what we conceive to be its purpose will not be significantly advanced by the enactment of the limitation. But questions such as this are for Congress, rather than for this Court; our role is limited to the determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go to a household containing an individual who is unrelated to any other member of the household.

The limitation which Congress enacted could, in the judgment of reasonable men, conceivably deny food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program. Since the food stamp program is not intended to be a subsidy for every individual who desires low-cost food, this was a permissible congressional decision quite consistent with the underlying policy of the Act. The fact that the limitation will have unfortunate and perhaps unintended consequences beyond this does not make it unconstitutional.

CITY OF CLEBURNE, TEXAS v. CLEBURNE LIVING CENTER, INC.

473 U.S. 432 (1985)

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

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.

The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. After holding a public hearing on CLC's application, the City Council voted 3 to 1 to deny a special use permit.

II

[W]e 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, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus 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. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, but it has also provided the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty."

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.

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. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an "appropriate" education, not one that is equal in all respects to the education of nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate. Similarly, the Developmental Disabilities Assistance Act and the Texas Act give the retarded the right to live only in the "least restrictive setting" appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others. Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies

must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

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 for the reasons given by the Court of Appeals, 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, and we decline to do so.

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. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. 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.

[III]

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

It is true, as already pointed out, 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.

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council—doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. In the words of the

Court of Appeals, "[t]he City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot."

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

C. CLASSIFICATIONS BASED ON RACEAND NATIONAL ORIGIN

Of all in the infinite array of distinctions drawn by American governments in the past 230 years, none has been more important than race discrimination. Some injustices are so enormous as to defy comprehension. Slavery, the apartheid that followed it in much of the country, and the systematic race discrimination that has existed throughout the nation are a profound embarrassment and a human tragedy of incalculable dimensions.

In discussing discrimination based on race and national origin, this section begins in subsection 1 by looking at race discrimination and slavery before the Civil War. Subsection 2 explains that strict scrutiny is used for evaluating race and national origin classifications.

Subsection 3 focuses on the question of how the existence of a race or national origin classification can be proven. There are two ways of proving such discrimination. One is where the classification exists on the face of the law; that is, the law in its very terms draws a distinction among people based on race or national origin. Alternatively, if a law is facially neutral, a racial classification can be proven by demonstrating that the law has a discriminatory purpose and a discriminatory impact. Each of these is discussed in turn.

No area of race discrimination has produced more litigation or has been more difficult for the courts than the problem of school segregation. Subsection 4 examines the issues surrounding remedies for school segregation.

Finally, subsection 5 discusses racial classifications that benefit minorities. This, of course, is the controversial issue of affirmative action that has produced a number of major Supreme Court decisions in recent years.

1. Race Discrimination and Slavery Before the Thirteenth and Fourteenth Amendments

Prior to the adoption of the Thirteenth Amendment in 1865, slavery was constitutional. Prior to the adoption of the Fourteenth Amendment in 1868, there was no constitutional assurance of equal protection and thus no limit on race discrimination. Despite the majestic words of the Declaration of Independence that "all men are created equal," blacks were anything but equal under the Constitution.

Several constitutional provisions expressly protected aspects of the institution of slavery. Article I, §2 requires apportionment of the House of Representatives based on the "whole Number of free Persons" and "three fifths of all other Persons." Article I, §9 prevented Congress from banning the importation of slaves until 1808 and Article V of the Constitution prohibited this provision from being altered by constitutional amendment. Article IV, §2 contains the Fugitive Slave Clause, which provided, "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."

Southern states simply would not have accepted a Constitution that abolished slavery. Additionally, many of the most influential drafters at the Constitutional Convention were slave owners. For example, such prominent framers as George Washington, James Madison, and John Rutledge all owned slaves.[36] The result was a Constitution that protected the institution of slavery.

The judiciary consistently enforced the institution of slavery by ruling in favor of slaveowners and against slaves.[37] For example, the Court enforced the Fugitive Slave Clause and prevented Northern states from protecting escaped slaves. In Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), the Supreme Court declared unconstitutional a state law that prevented the use of force or violence to remove any person from the state to return the individual to slavery. The Fugitive Slave Act of 1793, adopted by the second Congress, required that judges return escaped slaves. In *Prigg*, the Supreme Court relied on this statute and the Fugitive Slave Clause to invalidate the Pennsylvania law. Justice Joseph Story, writing for the Court, held that the Constitution prohibited states from interfering with the return of fugitive slaves. The Court explained that the "object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude." Indeed, the Court said that the Fugitive Slave Clause "was so vital . . . that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed." Thus, the Court concluded that "we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave." Likewise, the Court also held that states could punish those who harbored fugitive slaves.

At no point prior to the Civil War did the Supreme Court significantly limit slavery or even raise serious questions about its constitutionality.[38] Nor were state courts, even in the North, a significant force in ending slavery. For example, in State v. Post, 20 N.J.L. 368

(1845), the Supreme Court of New Jersey rejected a claim that the state constitution abolished slavery. The Court said that "it has been often adjudged, both by the State and Federal courts, that slavery still exists; that the master's right of property in the slave has not been affected either by the declaration of independence, or the constitution of the United States."

The importance of slavery as a social and political issue during this time period cannot be overstated. Every discussion of the relationship between the federal and state governments was directly or indirectly about the slavery question. It was the central dispute of the time and affected almost all other issues.

DRED SCOTT v. SANDFORD

In 1819, a major national controversy surrounded the admission of Missouri as a state and whether it, and other areas covered by the Louisiana Purchase, would be free or slave states. In a compromise that was intended to resolve the issue, known as the Missouri Compromise, Congress admitted Missouri as a slave state but prohibited slavery in the territories north of the latitude of 36°30′. Territories below this line could decide whether to allow slavery and could make that choice when admitted as states.

In Dred Scott v. Sandford, which follows, the Supreme Court declared the Missouri Compromise unconstitutional and broadly held that slaves were property, not citizens. Dred Scott, a slave owned in Missouri by John Emerson, was taken into Illinois, a free state. After Emerson died, John Sanford, a resident of New York, administered his estate.[39] Scott sued Sanford in federal court, basing jurisdiction on diversity of citizenship, and claimed that his residence in Illinois made him a free person.

The U.S. Supreme Court ruled against Scott in a decision that fills more than 200 pages in the United States Reports.

DRED SCOTT v. SANDFORD

60 U.S. (19 How.) 393 (1857)

Chief Justice TANEY delivered the opinion of the Court.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?

One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of

persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of such courts, or rules that may have been laid down by common-law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws.

[T]he question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and

neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

The language of the Declaration of Independence is equally conclusive: It . . . says: “We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.” The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

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The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court

to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

Although the Supreme Court undoubtedly thought that it was resolving the controversy over slavery in Dred Scott v. Sandford, the decision had exactly the opposite effect. The ruling became the focal point in the debate over slavery, and by striking down the Missouri Compromise, the decision helped to precipitate the Civil War.

Although Northern states generally did not allow slavery and often adopted laws to undermine that reprehensible institution, these states certainly did not provide equality for blacks before the Civil War. Laws in Northern states did not guarantee equal protection but, rather, institutionalized discrimination in diverse ways such as by prohibiting interracial marriage and requiring separation of the races in schools.[40]

THE POST-CIVIL WAR AMENDMENTS

As the Civil War was ending, in 1865, Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Yet it was obvious that the Thirteenth Amendment would not by itself secure the rights of former slaves; Southern states systematically discriminated against blacks in every imaginable way. Congress therefore approved and the states ratified the Fourteenth Amendment in 1868.[41] Section 1 of the Fourteenth Amendment overrules the *Dred Scott* decision by declaring that all persons “born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.” Section 1 also guarantees that no state shall deprive any citizen of the privileges or immunities of citizenship, or deprive any person of life, liberty, or property without due process of law, or deny any person “equal protection of the laws.”

2. Strict Scrutiny for Discrimination Based on Race and National Origin

It now is clearly established that racial classifications will be allowed only if the government can meet the heavy burden of demonstrating that the discrimination is necessary to achieve a compelling government purpose.[42] In other words, the government must show an extremely important reason for its action *and* it must demonstrate that the goal cannot be achieved through any less discriminatory alternative.[43] The Court has expressly declared that all racial classifications—whether disadvantaging or helping minorities—must meet strict scrutiny.[44]

Ironically, the Supreme Court first articulated the requirement for strict scrutiny for discrimination based on race and national origin in Korematsu v. United States, 323 U.S. 214 (1944) (presented below), which upheld the constitutionality of the relocation of Japanese Americans during World War II. The Court declared, "[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. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

The Supreme Court has identified many reasons why strict scrutiny is appropriate for race and national origin classifications. These justifications are important both in understanding the Court's approach to racial discrimination and also in evaluating whether other types of discrimination warrant heightened scrutiny.

The Court long has recognized that the primary purpose of the Fourteenth Amendment was to protect African Americans; in fact, the initial Supreme Court decisions construing the Equal Protection Clause suggested that it could be used only to protect blacks.[45] The Court has emphasized that the long history of racial discrimination makes it likely that racial classifications will be based on stereotypes and prejudices. Chief Justice Warren Burger wrote, "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns."[46]

Additionally, heightened scrutiny for government actions discriminating against racial and national origin minorities is justified because of the relative political powerlessness of these groups. In the famous *Carolene Products* footnote, the Supreme Court indicated that "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 thus "may call for a correspondingly more searching judicial inquiry."[47] Prejudice and the history of discrimination make it less likely that racial and national origin minorities can protect themselves through the political process.

Also, the Court has emphasized that race is an immutable trait.[48] It is unfair to discriminate against people for a characteristic that is acquired at birth and cannot be changed.

For all of these reasons, it is firmly established that race and national origin classifications must meet the most exacting standard of judicial review. Such discrimination will be tolerated only if the government can prove that it is necessary to achieve a compelling government purpose.

3. Proving the Existence of a Race or National Origin Classification

There are two alternative ways of demonstrating the existence of a race or national origin classification. One is where the classification exists on the face of the law; that is, the text of the law draws a distinction among people based on race or national origin. Alternatively, if a law is facially neutral, a race or national origin classification might be proven by demonstrating discriminatory administration or discriminatory impact; however, the Supreme Court has held that this also requires proof of a discriminatory purpose. Subsection a looks at racial classifications on the face of the law, and subsection b considers facially neutral laws with a discriminatory impact or with discriminatory administration.

a. Race and National Origin Classifications on the Face of the Law

Facial race and national origin classifications exist when a law, in its very terms, draws a distinction among people based on those characteristics. There are three major types of such laws.

RACE-SPECIFIC CLASSIFICATIONS THAT DISADVANTAGE RACIAL MINORITIES

First, there are laws that expressly impose a burden or disadvantage on people because of their race or national origin. For example, in Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879), the Supreme Court declared unconstitutional a West Virginia law that limited jury service to “white male persons who are twenty-one years of age and who are citizens of this State.” The Court explained that the Fourteenth Amendment was “designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.” The Court declared the law unconstitutional because it expressly “singled out” and disadvantaged blacks.

There is only one situation in which the Court expressly upheld under equal protection racial classifications burdening minorities: the rulings affirming the constitutionality of the evacuation of Japanese Americans during World War II. During World War II, 110,000 Japanese Americans—adults and children, aliens and citizens—were forcibly uprooted from their homes and placed in concentration camps. In some camps, they were housed in horse stalls and emprisoned behind barbed wire.[49] The government’s purported justification was national security—a fear that Japanese Americans on the West Coast might aid an invading Japanese army or commit acts of espionage and sabotage. No evidence of a specific threat was required to evacuate and intern a person. Race alone was used to determine who would be uprooted and incarcerated and who would remain free.

As you read Korematsu v. United States, consider whether the Court’s decision was appropriate judicial deference to the military during wartime or unjustified judicial abdication in the face of racial prejudice and human rights violations.

KOREMATSU v. UNITED STATES

323 U.S. 214 (1944)

Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In Kiyoshi Hirabayashi v. United States (1943), we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the

entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot —by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Justice MURPHY, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast “all persons of Japanese ancestry, both alien and non-alien,” clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an “immediate, imminent, and impending” public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law. The exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies . . . at large today” along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every

charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow. No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer. Journ. of Int. Law 443, 444-46; House Report No. 2124 (77th Cong., 2d Sess.), 280-1.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one 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 individuals—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.

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My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

In Ex parte Endo, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Supreme Court held that the continued detention of Japanese Americans was unwarranted. The Court's holding was narrow, simply concluding that the executive orders that provided the authority for the evacuation of Japanese Americans did not expressly authorize the continued detention of loyal Japanese Americans. The Court did observe that "[a] citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color." Yet the Court never declared the evacuation and internment of Japanese Americans unconstitutional.

RACIAL CLASSIFICATIONS BURDENING BOTH WHITES AND MINORITIES

A second type of racial classification that can exist on the face of the law is government action that burdens both whites and minorities. For example, antimiscegenation laws—statutes that prohibit interracial cohabitation and marriage—apply to both whites and blacks. In fact, the Supreme Court initially upheld such laws on the ground that they did not discriminate; the Court saw them as treating blacks and whites equally. In Pace v. Alabama, 106 U.S. (16 Otto) 583 (1882), the Court upheld an Alabama law that provided

for harsher penalties for adultery and fornication if the couple were composed of a white and a black than if the couple were both of the same race.

Subsequently, however, the Court recognized that such racial classifications are impermissible under the Equal Protection Clause because they are based on assumptions of the inferiority of blacks to whites. In McLaughlin v. Florida, 379 U.S. 184 (1964), the Supreme Court declared unconstitutional a Florida law that prohibited the habitual occupation of a room at night by unmarried interracial couples. The Court indicated that *Pace* "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." The Court emphasized that the state offered no acceptable justification for why a race-neutral law could not adequately serve its purposes of punishing premarital sexual relations.

In Loving v. Virginia, the Supreme Court considered the constitutionality of a state's miscegenation statute that made it a crime for a white person to marry outside the Caucasian race.[50]

LOVING v. VIRGINIA

388 U.S. 1 (1967)

Chief Justice WARREN delivered the opinion of the Court.

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

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

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

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The Supreme Court of Appeals upheld the

constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions.

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," a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage. Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

[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.

[W]e 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.

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." 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.

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

The following case, in which a court used racial considerations to change a child custody order, also illustrates the "facial" use of race in a manner that could equally disadvantage whites or racial minorities.

PALMORE v. SIDOTI

466 U.S. 429 (1984)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their 3-year-old daughter. In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent."

[T]he court then noted the counselor's recommendation for a change in custody because "[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father and to society. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what it regarded as the damaging impact on the child from remaining in a racially mixed household. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

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 stepparent 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. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

LAWS REQUIRING SEPARATION OF THE RACES

Statutes requiring separation of the races are a third type of racial classification that can exist on the face of the law. During the Reconstruction era that followed the Civil War, the South was under military rule and Congress enacted many laws to protect civil rights.[51] Substantial progress was made in protecting the rights of the former slaves.

By the 1880s, Reconstruction was over. In part, it ended through a compromise in 1877 to resolve a disputed presidential election. Although it appeared that Democrat Samuel Tilden won a majority of the popular vote, Democrats in Congress agreed to the election of Republican Rutherford Hayes in exchange for an end of military rule in the South. Also, in 1883, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court declared

unconstitutional the Civil Rights Act of 1875, which prohibited discrimination by places of public accommodations such as inns, theaters, and places of public amusement.[52] The Supreme Court broadly held that the Fourteenth Amendment only applies to government action, not to private conduct, and that therefore Congress acting under §5 of the Fourteenth Amendment can regulate only government actions.

As Reconstruction ended, many states, especially in the South, adopted laws that discriminated against blacks. Private violence against blacks increased dramatically—more than 3,000 lynchings were reported in the last two decades of the nineteenth century.[53] Every Southern state enacted statutes that required separation of the races in virtually every aspect of life. Called "Jim Crow laws," these statutes created a system of apartheid in which the government mandated segregation in public accommodations, transportation, schools, and almost everything else.[54]

Plessy v. Ferguson is the key case in which the Supreme Court considered and upheld laws requiring segregation of the races.

PLESSY v. FERGUSON

163 U.S. 537 (1896)

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 first section of the statute enacts "that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to."

The petition for the writ of prohibition averred that petitioner 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 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 have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.

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.

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.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among

whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

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

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. 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. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of “equal” accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

”Separate but equal” thus became the law of the land even though separate was anything but equal. In several subsequent cases, the Court reaffirmed Plessy v. Ferguson. “Separate but equal” was expressly approved in the realm of education. In Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899), the Court upheld the government’s operation of a high school open only for white students while none was available for blacks. The Court emphasized that local authorities were to be allowed great discretion in allocating funds between blacks and whites and that “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.”

In Berea College v. Kentucky, 211 U.S. 45 (1908), the Supreme Court affirmed the conviction of a private college that had violated a Kentucky law that required the separation of the races in education. Similarly, in Gong Lum v. Rice, 275 U.S. 78 (1927), the Supreme Court concluded that Mississippi could exclude a child of Chinese ancestry from attending schools reserved for whites. The Court said that the law was settled that

racial segregation was permissible and that it did not "think that the question is any different or that any different result can be reached . . . where the issue is as between white pupils and the pupils of the yellow races."

THE INITIAL ATTACK ON "SEPARATE BUT EQUAL"

In several cases between 1938 and 1954, the Supreme Court found that states denied equal protection by failing to provide educational opportunities for blacks that were available to whites. Interestingly, most of these decisions involved the failure of states to provide equal opportunity for the legal education of blacks. The Court did not question the doctrine of separate but equal—instead it concluded that the lack of opportunities for blacks was unconstitutional.

In Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), the Supreme Court held that it was unconstitutional for Missouri to refuse to admit blacks to its law school, but instead to pay for blacks to attend out-of-state law schools. The Court explained that the "basic consideration is not as to what sort of opportunities other States provide, . . . but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color." In response, Missouri did not admit blacks to its law school, but instead created a new law school for blacks.

In Sweatt v. Painter, 339 U.S. 629 (1950), the Supreme Court for the first time ordered that a white university admit a black student. The University of Texas Law School had denied Heman Sweatt admission on the ground that he could attend the recently created Prairie View Law School. Although the Court was urged to reconsider Plessy v. Ferguson, it refused and instead found that the schools obviously were not equal. The University of Texas Law School had 16 full-time faculty members and substantial facilities. Prairie View Law School opened in 1947 with no full-time faculty and no library, though by the time the Court decided the case there were five full-time professors and a small library. The Court concluded, "[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

In McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), the Supreme Court held that once blacks were admitted to a previously all-white school, the university could not force them to sit in segregated areas of classrooms, libraries, and cafeterias. The Court ruled that such segregation hindered the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

The reality, of course, was that the laws required racial separation but not equality. Only 1 of 41 law schools in the South was for blacks, and only 1 of 30 medical schools and none of 36 engineering schools admitted blacks.[55] Those facilities that existed for blacks were inferior by every measure.

BROWN v. BOARD OF EDUCATION

In the 1952-1953 term, the Supreme Court granted review in five cases that challenged the doctrine of separate but equal in the context of elementary and high school education.[56] At the time, 17 states and the District of Columbia segregated public schools.[57] The school systems challenged in the five cases before the Supreme Court involved schools that were totally unequal. For example, one of the cases was a challenge to South Carolina's educational system.[58] The white schools had 1 teacher for every 28 pupils; the black schools had 1 teacher for every 47 students. The white schools were brick and stucco; the black schools were made of rotting wood. The white schools had indoor plumbing; the black schools had outhouses.[59]

The five cases were argued together during the 1952-1953 term. The justices could not agree as to a decision, and the cases were set for reargument for the following year. According to Justice William Douglas's autobiography, had the Supreme Court ruled in 1953, the decision would have been five to four to affirm Plessy v. Ferguson and the separate but equal doctrine:

> When the cases had been argued in December of 1952, only four of us—Minton, Burton, Black, and myself—felt that segregation was unconstitutional. . . . It was clear that if a decision had been reached in the 1952 Term, we would have had five saying that separate but equal schools were constitutional, that separate but unequal schools were not constitutional, and that the remedy was to give the states time to make the two systems of schools equal.[60]

The Supreme Court asked the parties to brief several questions that primarily focused on the intent of the framers of the Fourteenth Amendment. In the summer between the two Supreme Court terms, Chief Justice Fred Vinson died of a heart attack, and President Dwight Eisenhower appointed California governor Earl Warren to be the new chief justice. The cases were argued on October 13, 1953, and through intense effort, Chief Justice Warren persuaded all of the justices to join a unanimous decision holding that separate but equal was impermissible in the realm of public education.[61]

On May 17, 1954, the Supreme Court released its decision in Brown v. Board of Education.

BROWN v. BOARD OF EDUCATION

347 U.S. 483 (1954)

Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to

race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment.

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. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

The words of the [Fourteenth] 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 the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other “tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

To separate [children] 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.[62] Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

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. Cases ordered restored to docket for further argument on question of appropriate decrees.

In appraising *Brown*, it is important to consider the Court's emphasis on the harms of segregation in education, rather than providing an overall constitutional judgment about the impermissibility of government-mandated segregation. The Court supported its claim that separate can never be equal in education with citations to social science studies. This has been enormously controversial. Some argue that the Court erred by relying on social science studies to support its conclusion, rather than expressing a moral judgment that segregation was wrong.[63] Indeed, Professor Mark Yudof argued that "[v]irtually everyone who has examined the question now agrees that the Court erred" in relying on the social science data.[64] The concern is that the studies were "methodologically unsound" and that reliance on them made the decision vulnerable if future research came to differing conclusions.

Yet others argue that Chief Justice Warren took the approach needed to secure a unanimous ruling from the Court, widely perceived as essential in light of the intense opposition to the decision. By focusing on the inherent inequality of racially segregated schools, and by supporting this claim with citations to social science research, Warren was able to secure a unanimous ruling.

The intense opposition to *Brown* and the Supreme Court's efforts to enforce it are discussed in the next section. A key question is whether the Court could have done more to achieve greater compliance with its desegregation mandate.

THE INVALIDATION OF SEGREGATION IN OTHER CONTEXTS

Others criticized *Brown* for focusing exclusively on education and thus failing to provide a basis for declaring segregation unconstitutional in other contexts.[65] Following *Brown*, in a series of *per curiam* opinions, the Supreme Court affirmed lower court decisions declaring unconstitutional state laws requiring segregation in all of the remaining areas of Southern life. For example, in Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955), the Supreme Court, in a memorandum disposition without an opinion, affirmed a lower court decision declaring unconstitutional a law requiring segregation in the use of public beaches and bathhouses. The Court did the exact same thing in Holmes v. City of Atlanta, 350 U.S. 879 (1955), in declaring unconstitutional segregation of municipal golf courses; in Gayle v. Browder, 352 U.S. 903 (1956), in declaring unconstitutional the segregation of a municipal bus system; in Johnson v. Virginia, 373 U.S. 61 (1963), in declaring unconstitutional segregation of courtroom seating; and in Turner v. City of Memphis, 369 U.S. 350 (1962), in declaring unconstitutional segregation of public restaurants.

Although these decisions, of course, reached the necessary result, the Court can be criticized for deciding without any opinion. The decision in *Brown* was based on the importance of education and the harms of segregation in that area. The unconstitutionality of segregation in beaches, golf courses, or buses required a separate explanation, one that the Court never offered.

Nonetheless, it is clearly established that laws requiring separation of the races are racial classifications that will be allowed only if strict scrutiny is met. In Johnson v. California, 543 U.S. 499 (2005), the Court reaffirmed this in the context of prisons. Although courts usually give great deference to prisons, the Supreme Court held that routine racial segregation of prisoners must meet strict scrutiny. 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.

Justice O'Connor wrote for the Court and noted that "the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are '[p]retty close' to zero percent. The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and Northern California Hispanics are separated from Southern California Hispanics. The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs."

The Court held that the CDC policy had to meet strict scrutiny:

> The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"—that is, it "neither benefits nor burdens one group or individual more than any other group or individual." In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." Indeed, we rejected the notion that separate can ever be equal —or "neutral"—50 years ago in Brown v. Board of Education (1954), and we refuse to resurrect it today.

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." Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract."

Because the CDC's policy is an express racial classification, it is "immediately suspect." We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." McCleskey v. Kemp (1987).

The CDC argues that "[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations" requires a more relaxed standard of review for its segregation policy. But we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion.

The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance.

b. Facially Neutral Laws with a Discriminatory Impact or with Discriminatory Administration

THE REQUIREMENT FOR PROOF OF A DISCRIMINATORY PURPOSE

If a racial classification appears on the face of the law, strict scrutiny is used. However, some laws that are facially race neutral are administered in a manner that discriminates against minorities or has a disproportionate impact against them. The Supreme Court has held that there must be proof of a discriminatory purpose for such laws to be treated as racial or national origin classifications.

Washington v. Davis was a key case articulating this requirement.

WASHINGTON v. DAVIS

426 U.S. 229 (1976)

Justice WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department.

I

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service

Commission. The respondents Harley and Sellers were permitted to intervene, their amended complaint asserting that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution."

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," and which was "designed to test verbal ability, vocabulary, reading and comprehension."

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief.

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. 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.

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).

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. 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, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated. Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance to preserve peace and avoid deficits were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged,

discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

[I]t should be observed that every federal court, except the District Court in this case, presented with proof identical to that offered to validate Test 21 has reached a conclusion directly opposite to that of the Court today. Sound policy considerations support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition. Today's result will prove particularly unfortunate if it is extended to govern Title VII cases.

Although Washington v. Davis holds that equal protection requires proof of a discriminatory purpose in order to demonstrate that a facially neutral law constitutes a racial classification, civil rights statutes can, and often do, allow violations to be proven based on discriminatory impact without evidence of a discriminatory purpose. For example, Title VII of the 1964 Civil Rights Act allows employment discrimination to be established by proof of discriminatory impact.[66]

The Court has frequently applied Washington v. Davis to reject equal protection challenges to facially neutral laws that have a racially discriminatory impact. A particularly important example of this is McCleskey v. Kemp, in which the Court rejected an equal protection challenge to the administration of the death penalty.

MCCLESKEY v. KEMP

481 U.S. 279 (1987)

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

I

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. The evidence at trial indicated that McCleskey and three accomplices planned and carried out the robbery. All four were armed. McCleskey entered the front of the store while the other three entered the rear. McCleskey secured the front of the store by rounding up the customers and forcing them to lie face down on the floor. The other three rounded up the employees in the rear and tied them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and $6. During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

Several weeks later, McCleskey was arrested in connection with an unrelated offense. He confessed that he had participated in the furniture store robbery, but denied that he had shot the police officer. At trial, the State introduced evidence that at least one of the bullets that struck the officer was fired from a .38 caliber Rossi revolver. This description matched the description of the gun that McCleskey had carried during the robbery. The State also introduced the testimony of two witnesses who had heard McCleskey admit to the shooting.

The jury convicted McCleskey of murder. At the penalty hearing, the jury heard arguments as to the appropriate sentence. Under Georgia law, the jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances. The jury in this case found two aggravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, and the murder was committed upon a peace officer engaged in the performance of his duties. In making its decision whether to impose the death sentence, the jury considered the mitigating and aggravating circumstances of McCleskey's conduct. McCleskey offered no mitigating evidence. The jury recommended that he be sentenced to death on the murder charge and to consecutive life sentences on the armed robbery charges. The court followed the jury's recommendation and sentenced McCleskey to death.

McCleskey filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth, and (the Baldus study) that

purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

II

McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment. He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers. As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other court that has considered such a challenge, that this claim must fail.

A

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Thus, to prevail under

the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

[E]ach particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Similarly, the policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Gregg v. Georgia (1976) (White, J., concurring). Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decision-makers in McCleskey's case acted with discriminatory purpose.

B

McCleskey also suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney (1979). For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. In Gregg v. Georgia, this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.

Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia. Accordingly, we reject McCleskey's equal protection claims.

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

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. Ibid. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

Furthermore, even examination of the sentencing system as a whole, factoring in those cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as non-racial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide.

These adjusted figures are only the most conservative indication of the risk that race will influence the death sentences of defendants in Georgia. Data unadjusted for the mitigating or aggravating effect of other factors show an even more pronounced disparity by race. The capital sentencing rate for all white-victim cases was almost 11 times greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with

black victims, and only 19% of white defendants with black victims. Since our decision upholding the Georgia capital sentencing system in *Gregg*, the State has executed seven persons. All of the seven were convicted of killing whites, and six of the seven executed were black. Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black.

Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed. By the time of the Civil War, a dual system of crime and punishment was well established in Georgia.

This Court has invalidated portions of the Georgia capital sentencing system three times over the past 15 years. The specter of race discrimination was acknowledged by the Court in striking down the Georgia death penalty statute in Furman v. Georgia. Justice Douglas cited studies suggesting imposition of the death penalty in racially discriminatory fashion, and found the standardless statutes before the Court "pregnant with discrimination."

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions. Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence.

The discretion afforded prosecutors and jurors in the Georgia capital sentencing system creates such opportunities. No guidelines govern prosecutorial decisions to seek the death penalty, and Georgia provides juries with no list of aggravating and mitigating factors, nor any standard for balancing them against one another. Once a jury identifies one aggravating factor, it has complete discretion in choosing life or death, and need not articulate its basis for selecting life imprisonment. The Georgia sentencing system therefore provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions.

Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," Plessy v. Ferguson (Harlan, J., dissenting), and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.

Whether discrimination can be proven by showing a discriminatory impact is crucial in determining the reach of the Equal Protection Clause. Undoubtedly, there are many areas where a significant discriminatory impact can be proven, but there is not sufficient evidence of a discriminatory purpose. Current law means that the government need not offer a racially neutral explanation for these effects and, indeed, need do no more than meet a rational basis test.

On the one hand, this can be justified by the view that the Equal Protection Clause is concerned with stopping discriminatory acts by the government, not in bringing about equal results. Moreover, there is concern that countless laws might have some discriminatory impact given the enormous inequalities between whites and racial minorities that continue to exist. Also it is argued that there will be laws that have the impact of benefiting minorities and that these can counterbalance those that have a detrimental effect.

On the other hand, as discussed below, proving discriminatory purpose is very difficult; rarely will such a motivation be expressed and benign purposes can be articulated for most laws.[67] Therefore, many laws with both a discriminatory purpose and effect might be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose. Scholars such as Professor Charles Lawrence argue that this is especially true because racism is often unconscious and such "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy."[68] In a society with a long history of discrimination, there can be a presumption that many laws with a discriminatory impact likely were motivated by a discriminatory purpose.[69]

Furthermore, it is argued that equal protection should be concerned with the results of government actions and not just their underlying motivations. Professor Lawrence Tribe

explained, “The goal of the Equal Protection Clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all. . . . [M]inorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”[70]

Ultimately, the issue of whether discriminatory purpose should be required, or whether discriminatory impact should be sufficient to prove an equal protection violation, turns on a determination of the fundamental mission of the Equal Protection Clause. Is the clause only about equal treatment by the government, or should it also be concerned with equal results?

The Supreme Court has extended the requirement for a discriminatory purpose to include the Fifteenth Amendment and its prohibition of race-based interference with the right to vote. Mobile v. Bolden is the key case.

CITY OF MOBILE v. BOLDEN

446 U.S. 55 (1980)

Justice STEWART announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST joined.

The city of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile’s Negro voters in contravention of federal statutory or constitutional law.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911, cities not covered by specific legislation were limited to governing themselves through a mayor and city council. In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government. Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since. The three Commissioners jointly exercise all legislative, executive and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three. As required by the state law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. The Court’s more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.

In Gomillion v. Lightfoot the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional per se. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment. See Washington v. Davis.

[T]he [district court and the court of appeals] found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated but that fact alone does not work a constitutional deprivation.

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.

Justice WHITE, dissenting.

Both the District Court and the Court of Appeals properly found that an invidious discriminatory purpose could be inferred from the totality of facts in this case. The Court's cryptic rejection of their conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors and that the trial courts are in a special position to make such intensely local appraisals.

In the instant case the District Court and the Court of Appeals faithfully applied [constitutional] principles in assessing whether the maintenance of a system of at-large elections for the selection of Mobile City Commissioners denied Mobile Negroes their Fourteenth and Fifteenth Amendment rights. Scrupulously adhering to our admonition that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," the District Court conducted a detailed factual inquiry into the openness of the candidate selection process to blacks.

The court noted that "Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965" and that "[t]he pervasive effects of past discrimination still substantially affec[t] black political participation." Although the District Court noted that "[s]ince the Voting Rights Act of 1965, blacks register and vote without hindrance," the court found that "local political processes are not equally open" to blacks. Despite the fact that Negroes constitute more than 35% of the population of Mobile, no Negro has ever been elected to the Mobile City Commission. The plaintiffs introduced extensive evidence of severe racial polarization in voting patterns during the 1960s and 1970s with "white voting for white and black for black if a white is opposed to a black," resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks. Nearly every active candidate for public office testified that because of racial polarization "it is highly unlikely that anytime in the foreseeable future, under the at-large system, . . . a black can be elected against a white." After single-member districts were created in Mobile County for state legislative elections, "three blacks of the present fourteen member Mobile County delegation have been elected." Based on the foregoing evidence, the District Court found "that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

Soon after *Mobile*, in Rogers v. Lodge, 458 U.S. 613 (1982), the Court found that an at-large election system was unconstitutional because there was sufficient proof of a

discriminatory purpose behind the election system. *Rogers* involved a challenge to an at-large election scheme for a large rural county in Georgia. The district court found that the "at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population."

The Supreme Court upheld this factual finding, emphasizing that blacks were a substantial majority of the population in the county but a distinct minority of the registered voters. The Court also noted that no black ever had been elected to the county commission. The Court pointed to a long history of purposeful discrimination against blacks in voting in the county, including the use of poll taxes, literacy tests, and white primaries. Furthermore, schools within the county were racially segregated until 1969 and still remained largely segregated. The Court additionally observed that blacks had been excluded from participating in the political process, in party affairs, and in primary elections. All of these factors justified the conclusion that there was a discriminatory purpose behind the at-large election system.

Mobile v. Bolden and Rogers v. Lodge are consistent in that both clearly say that proof of a discriminatory purpose is required in order to challenge an at-large election scheme. But the key question is whether there is a meaningful factual distinction between the cases. Both involve Southern cities with a long history of overt racial discrimination, including in voting. In neither had a black ever been elected. But the Court saw a meaningful difference in the proof offered in the two cases and found only sufficient evidence of discriminatory purpose in the latter.

The 1982 Amendments to the Voting Rights Act of 1965 largely obviated the need to distinguish the two cases and to discern what sufficiently establishes discriminatory purpose. The amendment was in response to Mobile v. Bolden and prohibits election systems that dilute the voting power of a racial minority. In other words, the 1982 Amendments eliminate the need for proof of discriminatory purpose in challenging an election system as being racially discriminatory.

IS PROOF OF A DISCRIMINATORY EFFECT ALSO REQUIRED?

The cases discussed thus far involve situations where there is proof of a racially discriminatory impact of a facially neutral law. A distinct question that arises much less often is whether proof of discriminatory purpose is sufficient, by itself, to establish an equal protection violation or whether there must be both discriminatory impact and discriminatory purpose. This issue arises far less frequently because usually there is evidence of a discriminatory impact and the question is whether there is adequate proof of discriminatory purpose. Although the Supreme Court has never expressly addressed the question, it appears that both are required. Palmer v. Thompson is the case that indicates that discriminatory impact also must be shown; indeed, in Washington v. Davis, above, it was cited as standing for that proposition.

PALMER v. THOMPSON

403 U.S. 217 (1971)

Justice BLACK delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court entered a judgment declaring that enforced segregation denied equal protection of the laws but it declined to issue an injunction. The Court of Appeals affirmed, and we denied certiorari. The city proceeded to desegregate its public parks, auditoriums, golf courses, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which the city owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and operate them on a desegregated basis.

The question, however, is whether this closing of the pools is state action that denies "the equal protection of the laws" to Negroes. It should be noted first that neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools. Furthermore, this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities.

Petitioners have also argued that respondents' action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.

First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Petitioners have argued strenuously that a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action. This proposition is, of course, true. Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. But the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that

the closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

It has not been so many years since it was first deemed proper and lawful for cities to tax their citizens to build and operate swimming pools for the public. Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound. Should citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here.

Justice DOUGLAS, dissenting.

May a State in order to avoid integration of the races abolish all of its public schools? That would dedicate the State to backwardness, ignorance, and existence in a new Dark Age. Yet is there anything in the Constitution that says that a State must have a public school system? Could a federal court enjoin the dismantling of a public school system? Could a federal court order a city to levy the taxes necessary to construct a public school system? Such supervision over municipal affairs by federal courts would be a vast undertaking, conceivably encompassing schools, parks, playgrounds, civic auditoriums, tennis courts, athletic fields, as well as swimming pools.

Closing of the pools probably works a greater hardship on the poor than on the rich; and it may work greater hardship on poor Negroes than on poor whites, a matter on which we have no light. Closing of the pools was at least in part racially motivated. And, as stated by the dissenters in the Court of Appeals:

> The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing apartheid or because it finds life in a multiracial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.

HOW IS A DISCRIMINATORY PURPOSE PROVEN?

The crucial question then becomes: How can it be proven that a facially neutral law is motivated by a discriminatory purpose? The Supreme Court has made it clear that showing such a purpose requires proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. In Personnel Administrator of Massachusetts v. Feeney, a case dealing with gender discrimination, the Court chose a narrow definition of what constitutes discriminatory intent.

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS v. FEENEY

442 U.S. 256 (1979)

Justice STEWART delivered the opinion of the Court.

This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Under ch. 31, §23, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, §23, unconstitutional and enjoined its operation.

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subjected to a military draft. When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans.

The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and

foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

> Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are that inevitable, can they meaningfully be described as unintended?

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet, nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

The issue, then, is how a plaintiff proves intent as defined in *Feeney*. In Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court explained the different ways in which discriminatory purpose can be proven.

VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP.

429 U.S. 252 (1977)

Justice POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from

single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. They alleged that the denial was racially discriminatory and that it violated the Fourteenth Amendment and the Fair Housing Act of 1968.

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).[71]

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.

With these in mind, we now address the case before us. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing. In sum, Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.[72]

The Court applied the approach described in *Arlington Heights* in Hunter v. Underwood, 471 U.S. 222 (1985), which considered an Alabama law that permanently denied the right to vote to anyone convicted of a crime involving "moral turpitude." The Supreme Court held that it was unconstitutional race discrimination for the state to disenfranchise those convicted of misdemeanors. The Court reiterated the approach that it articulated in *Arlington Heights*: "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."

The evidence in the case indicated that excluding a misdemeanant from voting had a substantial discriminatory impact against blacks and that racial discrimination was a key purpose of the legislature when the law was adopted in 1901. The Court found no persuasive evidence that the law would have been adopted without this motivation and thus concluded that it was unconstitutional because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."

APPLICATION: DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

One of the most important areas where the Supreme Court has followed and applied this analysis is in holding unconstitutional the discriminatory use of peremptory challenges. Laws providing for peremptory challenges—the ability of attorneys to exclude prospective jurors without having to prove cause for excusing them—are facially race neutral. But peremptory challenges based on race or gender are motivated by a discriminatory intent and have a discriminatory impact. Thus, the Court has held that race- or gender-based peremptory challenges deny equal protection whether exercised by a prosecutor,[73] a criminal defendant,[74] or a civil litigant.[75]

Initially, in Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court held that racial discrimination by a prosecutor could be proven only by showing a pattern of discriminatory peremptory challenges over a series of cases. A defendant could not allege a denial of equal protection by the prosecution based on how peremptory challenges were exercised in that case; systematic discrimination had to be proven. In Batson v. Kentucky, 476 U.S. 76 (1986), the Supreme Court overruled Swain v. Alabama and explained that "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions."

Batson thus holds that the discriminatory use of peremptory challenges by a prosecutor denies equal protection. *Batson* set forth a three-step process for determining whether there is impermissible discrimination in jury selection. First, the criminal defendant must set forth a prima facie case of discrimination by the prosecutor. The Supreme Court has not articulated precise standards for determining what is a prima facie case. In *Batson*, the Court said that "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." But in practice what is enough for a prima facie case is unclear. The Court simply expressed "confidence that trial judges, experienced in supervising voir dire" would be able to "consider all relevant circumstances" and decide if there is a prima facie case of discrimination.

Second, once the defendant has presented a prima facie case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for the peremptory challenges. The Court said that the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Subsequently, in Purkett v. Elem, 514 U.S. 765 (1995), the Supreme Court said that "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible. . . . It is not until the *third* step that the persuasiveness of the justification becomes relevant." In other words, the second step is simply the prosecutor offering the explanation; the third step is where the justification is evaluated.

In the third step, the trial court must decide whether the race-neutral explanation is persuasive or whether the "defendant has established purposeful discrimination." In two cases since *Batson*, the Supreme Court has elaborated this step and made it easier for courts to find a neutral explanation for the strikes of prospective jurors. In Hernandez v. New York, 500 U.S. 352 (1991), the Court found that there was a sufficient race-neutral explanation when a prosecutor said that he had struck two prospective Latino jurors because they spoke Spanish and therefore might not accept the translator's version of testimony from witnesses who were going to testify in Spanish.

Subsequently, in Purkett v. Elem, 514 U.S. 765 (1995), the Supreme Court said that "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett* did not elaborate; it is a short per curiam opinion, and there had been neither briefing nor oral arguments in the case. The Court upheld a trial court's conclusion that there was no discriminatory purpose when a prosecutor struck a prospective juror because of "long, unkempt hair, a mustache, and a beard." If any "legitimate reason," even one that does not make sense, is sufficient, *Batson* will be substantially weakened. It almost always will be possible for a prosecutor to articulate

some race-neutral reason for a strike, such as the physical appearance of the prospective juror.

The Court continues to apply *Batson*. Most recently, in Flowers v. Mississippi, 139 S. Ct. 2228 (2019), the Court held that *Batson* was violated when the same prosecutor struck 41 of 42 African-American jurors over six trials involving the same defendant. In Foster v. Chatman, 136 S. Ct. 1737 (2016), the Court held that *Batson* was violated when documents obtained via a public records request showed that the prosecutor had intentionally excluded African-American jurors.[76]

Although *Batson* involved only the issue of discriminatory peremptory strikes by prosecutors, the Court subsequently expanded it to apply to civil litigants and criminal defendants. In Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), the Supreme Court ruled that *Batson* applies in private civil litigation. The Court explained that there is state action because peremptory challenges are authorized by state law and supervised by courts. In Georgia v. McCollum, 505 U.S. 42 (1992), the Supreme Court held that criminal defendants may not exercise peremptory challenges in a discriminatory manner. Although criminal defendants are the antithesis of the government, the Court followed its earlier rulings that prospective jurors have a right to be free from discrimination in jury selection[77] and that there is state action when a private party exercises peremptory challenges.

In J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), the Supreme Court extended *Batson* to apply to gender-based discrimination in the use of peremptory challenges. The Court, in an opinion by Justice Blackmun, stressed the long history of discrimination against women in the legal system and concluded that gender, like race, was an impermissible basis for peremptory challenges. The Court indicated, however, that *Batson* only would apply to types of discrimination that would receive heightened scrutiny under equal protection analysis. In addition to race and gender, this would include discrimination against nonmarital children and aliens; neither, however, is likely to be a basis for peremptory challenges, especially since aliens are usually not allowed to serve on juries. An unresolved issue is whether *Batson* will apply to peremptory challenges based on religion or sexual orientation.

4. Remedies: The Problem of School Segregation

INTRODUCTION: THE PROBLEM OF REMEDIES

If a court finds that there is an equal protection violation, it then must fashion a remedy. In some cases, the remedy is simply invalidating the discriminatory law. For example, in Strauder v. West Virginia, 100 U.S. 303 (1879), the remedy was declaring unconstitutional the law prohibiting blacks from serving on juries; in Loving v. Virginia, 388 U.S. 1 (1967), the remedy was invalidating the law prohibiting interracial marriage.

In some cases, the Court must go further and fashion an injunction. For example, in desegregation cases, the Court generally will issue an order prohibiting the offending conduct. If a state had a law requiring segregation of a park or a beach, the Court would declare the law unconstitutional and also issue an injunction preventing continued segregation of the facility.

Fashioning a remedy was most difficult, by far, in the area of school desegregation. In the area of schools, it was not sufficient simply to order removal of the "whites only" sign. Pupils and teachers had to be reassigned. Because schools tend to serve neighborhoods and residential segregation was prevalent, desegregating schools proved extremely difficult. Indeed, in Brown v. Board of Education, in 1954, the Supreme Court did not address the issue of remedies but instead set the case for reargument as to the issue of the appropriate remedies. This is the Court's short decision the next year on the question of remedies.

BROWN v. BOARD OF EDUCATION

349 U.S. 294 (1955)

Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision.

Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

MASSIVE RESISTANCE

Southern states openly and aggressively resisted compliance with Brown v. Board of Education and the ordered end to school segregation. State legislatures adopted resolutions of “nullification” and “interposition” that declared that the Supreme Court’s decisions were without effect.[78] State officials attempted to obstruct desegregation in every imaginable way.

The Supreme Court first responded to this in Cooper v. Aaron, 358 U.S. 1 (1958). The Little Rock school system was ordered desegregated during the 1957-1958 school year, but the governor called out the Arkansas National Guard to keep blacks out. Black students began attending the previously all-white high school only after President Dwight Eisenhower used federal troops to protect them. The Little Rock school system then asked for a stay of the integration plan. The U.S. Supreme Court responded with an unusual opinion that was signed by each of the nine justices. The Court began its opinion by declaring, “As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.”

The Court declared that “[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the

Governor and Legislature." The Court invoked Marbury v. Madison to respond to the state's claim that it did not have to comply with the Supreme Court's decision. The Court said, "[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." The Court strongly reaffirmed *Brown* and said that it could not be nullified either "openly and directly by state legislators or state executive or judicial officers" or "indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

Cooper v. Aaron, however, did not end efforts by Southern states to circumvent *Brown* and prevent desegregation. Some areas attempted to close their public schools rather than desegregate.[79] Others sought to comply with *Brown* by creating voluntary transfer plans that allowed students to attend the school of their choice; segregation continued unabated under these plans.[80] Some school systems adopted "one grade a year" desegregation plans that would mean almost 20 years before a school system was fully desegregated.[81]

These and other state efforts succeeded in frustrating desegregation. In 1964, a decade after *Brown*, in the South, just 1.2 percent of black schoolchildren were attending school with whites.[82] In South Carolina, Alabama, and Mississippi, not one black child attended a public school with a white child in the 1962-1963 school year.[83] In North Carolina, only one-fifth of 1 percent—or 0.26 percent—of the black students attended desegregated schools in 1961, and the figure did not rise above 1 percent until 1965.[84] Similarly, in Virginia, in 1964, only 1.63 percent of blacks were attending desegregated schools.[85]

Except for Cooper v. Aaron, the Supreme Court did not hear a school desegregation case for almost a decade after *Brown*. In a series of cases in the mid- and late 1960s, the Court declared unconstitutional various obstructionist techniques used throughout the South. In 1963, in Goss v. Board of Education, 373 U.S. 683 (1963), the Supreme Court invalidated a Knoxville, Tennessee, law that allowed students who were assigned to new schools as part of desegregation to transfer from schools where they were a racial minority to ones where they would be in the racial majority. In other words, a white student who was placed in a predominately black school could transfer back to a white school, and a black student who was placed in a predominately white school could do the same. The Supreme Court declared this unconstitutional because "[i]t is readily apparent that the transfer system . . . lends itself to perpetuation of segregation."

In Griffin v. County School Bd., 377 U.S. 218 (1964), the Supreme Court declared it unconstitutional for school systems to close rather than desegregate. In 1959, Prince Edward County, Virginia, closed its school system rather than comply with a desegregation order. The Court ordered the schools reopened and explained that "[w]hatever 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." The Court also expressed its frustration with the resistance to desegregation and declared that "[t]here has been entirely too much deliberation and not enough speed."

In 1969, in Green v. County School Board, 391 U.S. 430 (1968), the Supreme Court declared unconstitutional a “freedom of choice plan” that was a common approach used to frustrate desegregation. A school system in rural Virginia adopted a desegregation plan where students could choose which school to attend. Three years after it was enacted, no white student was attending a black school, and only 15 percent of black students were attending white schools. The Court said that “[i]t is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. . . . 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.” The Court emphatically declared that school boards have “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.”

These Supreme Court decisions ending obstruction to desegregation were accompanied by an important federal law: the Civil Rights Act of 1964. Title VI prohibited discrimination by schools receiving federal funds. This became especially significant when Congress enacted the Elementary and Secondary Education Act of 1965, which appropriated $2.5 billion for schools. Additionally, the 1964 Civil Rights Act authorized the U.S. attorney general to intervene in desegregation suits.

The combination of federal court action and the federal law had an effect in bringing about desegregation. One by one the obstructionist techniques were defeated. Finally, by the mid-1960s, desegregation began to proceed. By 1968, the integration rate in the South rose to 32 percent, and by 1972-1973, 91.3 percent of Southern schools were desegregated.

Yet there is no doubt that despite over 60 years of judicial action, school segregation continues. Indeed, racial segregation in American schools has been increasing over the past decade. A study by the National School Boards Association found “a pattern in which impressive progress toward school integration among blacks and whites during the 1970s petered out in the 1980s.”[86] A study by Harvard professor Gary Orfield found that in the South, “[f]rom 1988 to 1998, most of the progress from the previous two decades in increasing integration in the region was lost. The South is still more integrated than it was before the civil rights revolution, but it is moving backwards at an accelerating rate.”[87]

In 1980, “63 percent of black students and 66 percent of Hispanics were in segregated schools, that is schools with more than half minority enrollment.”[88] Today, it is much more than this. Professor Orfield’s study shows that nationally the percentage of African American students attending schools with exclusively African American enrollment and schools where over 90 percent of the students are African American has increased dramatically over the past 15 years. A study by in 2012 by the Civil Rights Project at the University of California, Los Angeles, found that across the country, 43 percent of Latinos and 38 percent of blacks attend schools where fewer than 10 percent of their classmates are white. More than one in seven black and Latino students attend schools where fewer than 1 percent of their classmates are white.

The reality is that most children in the United States are educated only with children of their own race. For example, in 2012-2013, in the Boston public schools only 12 percent of the students were white.[89] In Chicago just 8.8 percent of children in the schools were white. In Dallas only 4.8 percent of children in the public schools were white, and in Los Angeles only 9.2 percent were white. In Washington, D.C., 85 percent of children were black or Hispanic and 11 percent were white.

JUDICIAL POWER TO IMPOSE REMEDIES IN SCHOOL DESEGREGATION CASES

In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court addressed the issue of the federal courts' power to issue remedies in school desegregation cases.

SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

402 U.S. 1 (1971)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. Brown v. Board of Education (1954).

This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing.

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In

devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out.

The central issue in this case is that of student assignment, and there are essentially four problem areas:

1. to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
2. whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
3. what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
4. what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) Racial Balances or Racial Quotas

In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) One-Race Schools

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities

should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

(3) Remedial Altering of Attendance Zones

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

(4) Transportation of Students

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible. Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority. The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." This system compares favorably with the transportation plan previously operated in Charlotte under which each day 26,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems would then be "unitary."

Although *Swann* broadly defined the remedial powers of federal courts, in Milliken v. Bradley the Supreme Court imposed a substantial limit on the courts' remedial powers in desegregation cases.

MILLIKEN v. BRADLEY

418 U.S. 717 (1974)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of

fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. The metropolitan area was then defined as Detroit plus 53 of the outlying school districts.

The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district. Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts constituting the consolidated metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term bonds be jeopardized unless approved by all of the component districts as well as the State? What body would determine that portion of the curricula now left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils?

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.

Justice WHITE, with whom Justice DOUGLAS, Justice BRENNAN, and Justice MARSHALL join, dissenting.

The District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices calculated to effect the segregation of the Detroit school system. The Court does not question these findings, nor could it reasonably do so. Neither does it question the obligation of the federal courts to devise a feasible and effective remedy. But it promptly cripples the ability of the judiciary to perform this task, which is of fundamental importance to our constitutional system, by fashioning a strict rule that remedies in school cases must stop at the school district line unless certain other conditions are met. As applied here, the remedy for unquestioned violations of the protection rights of Detroit's Negroes by the Detroit School Board and the State of Michigan must be totally confined to the limits of the school district and may not reach into adjoining or surrounding districts unless and until it is proved there has been some sort of "interdistrict violation"—unless unconstitutional actions of the Detroit School Board have had a segregative impact on other districts, or unless the segregated condition of the Detroit schools has itself been influenced by segregative practices in those surrounding districts into which it is proposed to extend the remedy.

The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.

Viewed in this light, remedies calling for school zoning, pairing, and pupil assignments, become more and more suspect as they require that schoolchildren spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems. Manifestly, these considerations are of immediate and urgent concern when the issue is the desegregation of a city school system where residential patterns are predominantly segregated and the respective areas occupied by blacks and whites are heavily populated and geographically extensive. Thus, if one postulates a metropolitan school system covering a sufficiently large area, with the population evenly divided between whites and Negroes and with the races occupying identifiable residential areas, there will be very real practical limits on the extent to which

racially identifiable schools can be eliminated within the school district. It is also apparent that the larger the proportion of Negroes in the area, the more difficult it would be to avoid having a substantial number of all-black or nearly all-black schools.

Milliken has a significant effect limiting the ability to achieve desegregation in many areas. In a number of major cities, inner-city school systems are substantially black and are surrounded by almost all-white suburbs. Desegregation obviously requires the ability to transfer students between the city and suburban schools. There simply are not enough white students in the city, or enough black students in the suburbs, to achieve desegregation without an interdistrict remedy. Yet *Milliken* precludes an interdistrict remedy unless there is proof of an interdistrict violation. In other words, a multidistrict remedy can be formulated for those districts whose own policies fostered discrimination or if a state law caused the interdistrict segregation. Otherwise, the remedy can include only those districts found to violate the Constitution. Such proof is often not available, although there have been some cases where the requirements of *Milliken* have been met.[90]

Milliken can be defended based on the traditional principle that a court has the authority to impose a remedy only after it is proven that the person or entity violated the law. But critics of *Milliken* argue that the segregated pattern in major metropolitan areas—blacks in the city and whites in the suburbs—did not occur by accident, but rather was the product of myriad government policies. Additionally, in many areas *Milliken* means no desegregation. Critics argue that together with San Antonio Independent School District v. Rodriguez[91]—which held that disparities in school funding do not violate equal protection—the result is separate and unequal schools: wealthy white suburban schools spending a great deal on education surrounding much poorer black city schools that spend much less on education.

WHEN SHOULD FEDERAL DESEGREGATION REMEDIES END?

In several cases, the Supreme Court has considered when a federal court desegregation order should be ended. The Court first addressed this issue in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). *Pasadena* involved a school system that had been segregated by law. A federal court order succeeded in desegregation: In 1970, no schools within the district were racially imbalanced. By 1974, five of the 32 schools in the district were over half black. The district court ordered that attendance lines be redrawn on an annual basis so that blacks would not be a majority in any school in the district. The Supreme Court deemed this improper. The Court noted that residential shifts were inevitable in cities and that they might alter the racial composition of the schools. The Court said that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." In the 1990s, the Court revisited this issue and held that federal court desegregation orders should end when a school reaches "unitary status."

BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS v. DOWELL

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Board of Education of Oklahoma City sought dissolution of a decree entered by the District Court imposing a school desegregation plan.

This school desegregation litigation began almost 30 years ago. In 1961, respondents, black students and their parents, sued petitioners, the Board of Education of Oklahoma City (Board), to end de jure segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system—one that was intentionally segregated by race. In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools. In 1972, finding that previous efforts had not been successful at eliminating state imposed segregation, the District Court ordered the Board to adopt the "Finger Plan," under which kindergarteners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.

p. 773

The lower courts have been inconsistent in their use of the term "unitary." Some have used it to identify a school district that has completely remedied all vestiges of past discrimination. Under that interpretation of the word, a unitary school district is one that has met the mandate of Brown v. Board of Education. Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan. In other words, such a school district could be called unitary and nevertheless still contain vestiges of past discrimination.

The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

Petitioner urges that we reinstate the decision of the District Court terminating the injunction, but we think that the preferable course is to remand the case to that court so that it may decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

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

Oklahoma gained statehood in 1907. For the next 65 years, the Oklahoma City School Board maintained segregated schools—initially relying on laws requiring dual school systems; thereafter, by exploiting residential segregation that had been created by legally enforced restrictive covenants. In 1972—18 years after this Court first found segregated schools unconstitutional—a federal court finally interrupted this cycle, enjoining the Oklahoma City School Board to implement a specific plan for achieving actual desegregation of its schools.

The practical question now before us is whether, 13 years after that injunction was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough. The Court remands the case for further evaluation of whether the purposes of the injunctive decree were achieved sufficient to justify the decree's dissolution. However, the inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant "vestige" of de jure segregation.

p. 774

I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed.

It is undisputed that replacing the Finger Plan [the desegregation order] with a system of neighborhood school assignments for grades K-4 resulted in a system of racially identifiable schools. Under the SRP, over one-half of Oklahoma City's elementary schools now have student bodies that are either 90% Afro-American or 90% non-Afro-American.

Because this principal vestige of de jure segregation persists, lifting the decree would clearly be premature at this point.

In Missouri v. Jenkins, 515 U.S. 1139 (1995), the Supreme Court ordered an end to a school desegregation order for the Kansas City schools.[92] Missouri law once required the racial segregation of all public schools. It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri, public schools. The federal court's desegregation effort made a difference. In 1983, 24 schools in the district had an African American enrollment of more than 90 percent or more. By 1993, no elementary-level student attended a school with an enrollment that was 90 percent or more African American. At the middle school and high school levels, the percentage of students attending schools with an African American enrollment of 90 percent or more declined from about 45 percent to 22 percent.

The Court, in an opinion by Chief Justice Rehnquist, ruled in favor of the state on every issue. There were three parts to the Court's holding. First, the Court ruled that the district

court's order that attempted to attract nonminority students from outside the district was impermissible because there was no proof of an interdistrict violation. Chief Justice Rehnquist applied Milliken v. Bradley to conclude that the interdistrict remedy—incentives to attract students from outside the district into the Kansas City schools—was impermissible because there only was proof of an intradistrict violation.

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries. Although the district court believed that an across-the-board salary increase to attract teachers was essential for desegregation, the Supreme Court concluded that it was not necessary as a remedy.

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order. The Court concluded that the Constitution requires equal opportunity and not any result and that therefore disparities between African American and white students on standardized tests was not a sufficient basis for concluding that desegregation had not been achieved. The Supreme Court held that once a desegregation order is complied with, the federal court effort should be ended. Disparity in test scores is not a basis for continued federal court involvement.

The most recent Supreme Court decision concerning remedies for segregation involved whether school districts may choose to use race as a factor in assigning students to achieve racial diversity in schools. The Court, five to four, said no.

PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1

555 U.S. 701 (2007)

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which Justices SCALIA, THOMAS, and ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. The plan allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part.

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, and in 1975 the District Court entered a desegregation decree. Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation.

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first-graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." If a school has reached the "extremes of the racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. After assignment, students at all grade levels are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines.

[III]

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in Grutter [v. Bollinger (2003)]. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." The diversity interest was not focused on race alone

but encompassed "all factors that may contribute to student body diversity." The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a highly individualized, holistic review.

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints"; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in Gratz [v. Bollinger (2003)], the plans here "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way.

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment." But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It 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.'"

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter*, to justify their race-based assignments. Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not to be achieved for its own sake."

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000-2001. In over one-third of the assignments affected by the racial tiebreaker the use of race in the end made no difference, and the district could identify only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned. Similarly, Jefferson County's use of racial classifications has only a minimal effect on the assignment of students.

While we do not suggest that greater use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications.

[IV]

Justice Breyer's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today's decision.

Justice Breyer's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,'" but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends and as to means." Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

In keeping with his view that strict scrutiny should not apply, Justice Breyer repeatedly urges deference to local school boards on these issues. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified."

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[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." Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."

The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential

treatment to American children on the basis of their color or race." What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that 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." There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." *Brown II*. What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

Justice THOMAS, concurring.

Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable. I wholly concur in the Chief Justice's opinion. I write separately to address several of the contentions in Justice Breyer's dissent. Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in Brown v. Board of Education (1954). This approach is just as wrong today as it was a half-century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in the dissent are not to the contrary. At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend these programs is to ignore the meaning of the word and the nature of the cases before us.

The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science

research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.

Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. Before *Brown*, the most prominent example of an exemplary black school was Dunbar High School. Dunbar is by no means an isolated example. Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.

It should escape no one that behind Justice Breyer's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.

Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown*.

The plans before us base school assignment decisions on students' race. Because "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. Plessy [v. Ferguson (1896)].

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

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome. In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.

I

The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. For this reason, among others, I do not join [those parts of the majority opinion]. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

This is by way of preface to my respectful submission that parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since Brown v. Board of Education (1954) should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in Plessy v. Ferguson (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decision-maker considers the

impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

[II]

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent's rationale to the context of public schools.

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between de jure and de facto segregation; the second, the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

Justice STEVENS, dissenting.

There is a cruel irony in the Chief Justice's reliance on our decision in Brown v. Board of Education (1955). The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep

under bridges, to beg in the streets, and to steal their bread." The Chief Justuce fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.

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

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that Brown v. Board of Education (1954) long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race-conscious than the plans before us. And we have understood that the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

I

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99-100% minority. In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating

earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities plaintiffs filed lawsuits claiming unconstitutional segregation. [Justice Breyer then described in detail the history of segregation in the Seattle and Louisville school systems.]

II

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann*. Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities."

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated—i.e., that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself.

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.

Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range.

This context is not a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described.

III

A

Compelling Interest

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the de facto resegregation of America's public schools.

Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. Other studies reach different conclusions. See, e.g., D. Armor, Forced Justice (1995). But the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one.

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation.

If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

B

Narrow Tailoring

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school board's assurances on faith, and I shall subject the "tailoring" of their plans to "rigorous judicial review." Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

First, the race-conscious criteria at issue only help set the outer bounds of broad ranges. They constitute but one part of plans that depend primarily upon other, nonracial elements. To use race in this way is not to set a forbidden "quota." In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend.

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, than other race-conscious restrictions this Court has previously approved. Indeed, the plans before us are more narrowly tailored than the race-conscious admission plans that this Court approved in *Grutter*. Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students less severely, not more severely, than the criteria at issue in *Grutter*. Disappointed students are not rejected from a State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

Third, the manner in which the school boards developed these plans itself reflects "narrow tailoring." Each plan was devised to overcome a history of segregated public schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan's use of race-conscious elements is diminished compared to the use of race in preceding integration plans.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40-year history that Part I sets forth, make clear that plans that are less explicitly race-based are unlikely to achieve the board's "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals.

Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils.

Nor could the school districts have accomplished their desired aims (e.g., avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, Justice Kennedy suggests that school boards: "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."

But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance and other statistics by race," tracking reveals the problem; it does not cure it.

[IV]

Consequences

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives. To do so provides further reason to believe that the plurality's approach is legally unsound.

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

As I have pointed out, de facto resegregation is on the rise. It is reasonable to conclude that such resegregation can create serious educational, social, and civic problems. Given the conditions in which school boards work to set policy, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would

deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow Justice Thomas' "'color-blind'" approach, may feel confident that, to end invidious discrimination, one must end all governmental use of race- conscious criteria including those with inclusive objectives. By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

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Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

5. Racial Classifications Benefiting Minorities

No topic in constitutional law is more controversial than affirmative action. In considering affirmative action, three questions are key: First, what level of scrutiny should be used for racial classifications benefiting minorities? Second, what purposes for affirmative action programs are sufficient to meet the level of scrutiny? Third, what techniques of affirmative action are sufficient to meet the level of scrutiny? In reading the cases concerning affirmative action, it is important to focus on how each decision answers these questions.

This section begins by presenting the initial cases concerning affirmative action, followed by those announcing strict scrutiny as the test for affirmative action programs. Then presented are the recent Supreme Court decisions concerning affirmative action in education and in drawing election district maps.

The Supreme Court first considered affirmative action in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The University of California-Davis Medical

School had set aside 16 slots in an entering class of 100 for minority students. The Supreme Court, in a five-to-four decision, without a majority opinion, invalidated the set-aside but ruled that colleges and universities may use race as one factor in admissions decisions to benefit minorities and enhance diversity.

Justice Louis Powell, writing on his behalf, said that strict scrutiny should be used for racial classifications benefiting minorities. He concluded that the set-aside failed strict scrutiny but that colleges and universities have a compelling interest in having a diverse student body and that many consider race as one factor in admissions decisions to benefit minorities.

Justice William Brennan, joined by Justices White, Marshall, and Blackmun, argued that intermediate scrutiny should be used for racial classifications benefiting minorities. These justices would have upheld the set-aside, as well as the use of race as a factor in admissions decisions.

Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, would have invalidated the set-aside and the use of race by colleges and universities as violating Title VI of the 1964 Civil Rights Act. Title VI prohibits recipients of federal funds from discriminating based on race.

Thus, there was no majority opinion as to the level of scrutiny for racial classifications benefiting minorities. Five justices voted to invalidate the set-aside, one on constitutional grounds and four on statutory grounds. Five justices approved colleges' and universities' pursuit of racial diversity by considering race as one factor in admissions decisions.

Two years after *Bakke*, in Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court again considered an affirmative action program but did not produce a majority opinion concerning the appropriate level of scrutiny. The Court upheld a federal law that required that 10 percent of federal public works monies given to local governments be set aside for minority-owned businesses. Chief Justice Burger, in an opinion joined by Justices White and Powell, concluded that the affirmative action program was justified to remedy past discrimination but said that the "opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in cases such as University of California Regents v. Bakke."

Three justices—Marshall, Brennan, and Blackmun—concurred in the judgment to uphold the affirmative action program but argued again that intermediate scrutiny should be used for racial classifications serving a remedial purpose. Finally, three justices—Stewart, Rehnquist, and Stevens—dissented and said that strict scrutiny was the appropriate test. Justice Stewart, joined by Justice Rehnquist, wrote, "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. . . . The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority."

In United States v. Paradise, 480 U.S. 149 (1987), the Supreme Court upheld a federal court order that was designed to remedy proven intentional discrimination by the Alabama Department of Public Safety and mandated that a qualified black had to be hired or promoted every time a white was hired or promoted. Justice Brennan, writing for

the plurality, found that "the relief ordered survives even strict scrutiny analysis"; "the race-conscious relief at issue here is justified by a compelling interest in remedying the discrimination."

In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Supreme Court declared unconstitutional a city's attempt to achieve faculty diversity in its schools by laying off white teachers with more seniority than black teachers who were retained. The Jackson, Michigan, school system, as part of a settlement to a discrimination suit, hired a number of African American teachers. When layoffs were required, the Board of Education decided that teachers with the most seniority would be retained, except that at no time would the percentage of minorities to be laid off exceed the percentage of minorities employed at the time of the layoffs. The result was that some white teachers were laid off even though they had more seniority than some of the black teachers who kept their jobs.

The Court rejected this as an acceptable means of affirmative action. The Court said that even if prior discrimination was proven, the layoff provision was not a constitutionally acceptable means of achieving even the compelling purpose of remedying prior discrimination. Justice Powell, writing for the plurality, said that "as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available."

Justice Powell expressly rejected the government's justifications for affirmative action: remedying past discrimination and providing role models for students. He wrote, "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Justice Powell also wrote, "The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . . Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students."

THE EMERGENCE OF STRICT SCRUTINY AS THE TEST

It was not until 1989, in Richmond v. J.A. Croson Co., that a majority of the Court agreed on the level of scrutiny to use in evaluating government affirmative action programs.

RICHMOND v. J.A. CROSON CO.

488 U.S. 469 (1989)

Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which the Chief Justice and Justice White join, and an opinion with respect to Parts III-A and V, in which The Chief Justice, Justice White, and Justice Kennedy join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors. The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." The Plan expired on June 30, 1988, and was in effect for approximately five years.

The Plan was adopted by the Richmond City Council after a public hearing. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.

II

It would seem clear that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of §1 of the Fourteenth Amendment. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

III

A

The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

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

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

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.

B

The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry." Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local

contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs.

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

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

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. None of [the district court's] "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry.

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. . . ." We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have

suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.

IV

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

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation. There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota.

V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the

effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

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

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

Justice SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign." I do not agree, however, with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.

I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a

social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."

In my view there is only one circumstance in which the States may act by race to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies.

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

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

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's position is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council has supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly

States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.

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

A year after *Croson*, in Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990), the Supreme Court held that congressionally approved affirmative action programs only need to meet intermediate scrutiny. The Supreme Court, in a five-to-four decision, upheld FCC policies that gave a preference to minority-owned businesses in broadcast licensing. The majority opinion expressly said, "We hold that benign race-conscious measures mandated by Congress—even if those measure[s] are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."

The majority opinion in *Metro Broadcasting* was written by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens. The dissent comprised Justices O'Connor, Kennedy, Scalia, and Rehnquist. Between *Metro Broadcasting*, in 1990, and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), four of the justices in the majority, but none of the justices in the dissent, resigned. In *Adarand*, the four dissenters from *Metro Broadcasting* were joined by Justice Thomas to create a majority that overruled *Metro Broadcasting*.

Justice O'Connor, writing for the Court, stated:

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.
>
> Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.
>
> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See United States v. Paradise. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

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The Court remanded the case for the application of strict scrutiny. Justice Scalia wrote separately to express his view that remedying past discrimination can virtually never meet strict scrutiny:

> I join the opinion of the Court except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.
>
> It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

Justice Thomas took a similar position:

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

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

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression." It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society." But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

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

Justice Stevens wrote for the dissent:

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. The Court's concept of "consistency" assumes that there

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

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

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

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program.

> Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so. In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

THE ARGUMENTS FOR AND AGAINST STRICT SCRUTINY

The debate over affirmative action is, in large part, as indicated in *Croson* and *Adarand*, about the level of scrutiny to be used. The reality is that the choice of the level of scrutiny is likely to be decisive in many cases in determining the fate of the affirmative action program.

Those who favor strict scrutiny for affirmative action programs argue that all racial classifications—whether invidious or benign—should be subjected to strict scrutiny. Justice Thomas, in *Adarand* above, espoused this view: "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." The view is that the Constitution requires that the government treat each person as an individual without regard to his or her race; strict scrutiny is used to ensure that this occurs.

Moreover, supporters of strict scrutiny for affirmative action argue that all racial classifications stigmatize and breed racial hostility, and therefore all should be subjected to strict scrutiny. Justice O'Connor, in *Croson*, stated, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Professor Michael Perry made a similar point that affirmative action "inevitably foments racial resentment and thereby strains the effort to gain wider acceptance for the principle of the moral equality of the races."[93]

On the other side of the debate, supporters of affirmative action argue that there is a significant difference between the government using racial classifications to benefit minorities and the government using racial classifications to disadvantage minorities. There is a long history of racism and discrimination against minorities but no similar history of persecution of whites.[94] Those who argue for a lower level of scrutiny for judicial review of affirmative action programs also emphasize that achieving social equality requires affirmative action at this point in American history. The tremendous continuing disparities between blacks and whites in areas such as education, employment, and public contracting necessitate remedial action. Applying strict scrutiny would greatly impede such remedial efforts because relatively few affirmative action programs have survived this rigorous review.

Also it is argued that there is a major difference between a majority discriminating against a minority and the majority discriminating against itself. Professor John Hart Ely explained, “When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and consequently, employing a stringent brand of review are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks.”[95]

THE USE OF RACE TO BENEFIT MINORITIES IN COLLEGE AND UNIVERSITY ADMISSIONS

In two cases, Grutter v. Bollinger and Gratz v. Bollinger, the Supreme Court considered the constitutionality of efforts by public colleges and universities to use racial classifications to benefit minorities and to enhance diversity. Simply put, in these cases, below, the Court held that colleges and universities may use race as one factor, among many, in admissions decisions, but it is not permissible to add a significant number of points to the admissions scores of minority students. In reading these important cases, it is important to consider how to draw the line between what is permissible and impermissible after these decisions. What types of efforts are likely to be allowed and which invalidated?

GRUTTER v. BOLLINGER

539 U.S. 306 (2003)

Justice O’Connor delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I

A

The Law School ranks among the Nation’s top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to “admit a group of students who individually and collectively are among the most capable,” the Law School looks for individuals with “substantial promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.” More broadly, the Law School seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court’s most recent ruling on the use of race in university admissions. See Regents of Univ. of Cal. v. Bakke (1978). Upon the unanimous adoption of the committee’s report by the Law School faculty, it became the Law School’s official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."

The policy does not define diversity "solely in terms of racial and ethnic status." Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan.

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.

We do not find it necessary to decide whether Justice Powell's opinion is binding. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

B

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Because the Fourteenth Amendment "protect[s] persons, not groups," all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." We 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."

Strict scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

III

A

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy. Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially

diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission to provide national security."

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. Plyler v. Doe (1982). This Court has long recognized that "education . . . is the very foundation of good citizenship." Brown v. Board of Education (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as amicus curiae, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." The purpose of the

narrow tailoring requirement is to ensure that "the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not "abandon[] strict scrutiny." Rather, as we have already explained, we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account."

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. Moreover, between 1993 and 2000, the number of African-American, Latino, and

Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice Kennedy speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors.

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law

School to become a much different institution and sacrifice a vital component of its educational mission.

The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.

The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." 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. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.

Justice GINSBURG, with whom Justice BREYER joins, concurring.

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body.

And schools in predominantly minority communities lag far behind others measured by the educational resources available to them.

However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice THOMAS, with whom Justice SCALIA joins, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority: "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury."

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal

Protection Clause and that the Constitution means the same thing today as it will in 300 months.

[I]

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity." This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" not simply the forbidden interest in "racial balancing," that the majority expressly rejects?[96]

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably. The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the educational benefits that are the end, or allegedly compelling state interest, not "diversity." One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." No serious effort is made to explain how

these benefits fit with the state interests the Court has recognized (or rejected) as compelling, or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination.

Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Michigan has no compelling interest in having a law school at all, much less an elite one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

This Court has limited the scope of equal protection review to interests and activities that occur within that State's jurisdiction. The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the University of Michigan Law School made up less than 6% of applicants to the Michigan bar, even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. Thus, while a mere 27% of the Law School's 2002 entering class are from Michigan, only half of these, it appears, will stay in Michigan. In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.

IV

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of . . . the academic quality of all admitted students," need not be considered before racial discrimination can be employed. In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work "'about as well.'" The majority errs, however, because race-neutral alternatives must only be "workable," and do "about as well" in vindicating the compelling state interest. The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as

I have demonstrated, it is not. Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, e.g., Flowers & Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen, The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white colleges).

p. 815

The majority grants deference to the Law School's "assessment that diversity will, in fact, yield educational benefits." It follows, therefore, that an HBC's assessment that racial homogeneity will yield educational benefits would similarly be given deference. An HBC's rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the majority's view of the Equal Protection Clause. Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a

"true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot. I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are per se harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.

I must contest the notion that the Law School's discrimination benefits those admitted as a result of it. The Court spends considerable time discussing the impressive display of amicus support for the Law School in this case from all corners of society. But nowhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. Compare with Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605-1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom).

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. See T. Sowell, Race and Culture 176-177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education"). Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities," instead continuing their social experiments on other people's children.

Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of

superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.

VII

The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time. I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire.

For the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Chief Justice REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of each underrepresented minority group. But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass." From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.

Justice KENNEDY, dissenting.

The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by The Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional."

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution

must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Deference is antithetical to strict scrutiny, not consistent with it.

It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

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539 U.S. 244 (2003)

Chief Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964." Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999. Hamacher applied for admission to the LSA for the fall of 1997 [and his] application was subsequently denied in April 1997, and he enrolled at Michigan State University.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan. Petitioners' complaint was a class-action suit [and] sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from "continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student.

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified . . . applicant" from these groups.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status. For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for

example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA [relied on] a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the "'development of the selection index for admissions in 1998 changed only the mechanics, not the substance of how race and ethnicity were considered in admissions.'"

II

Petitioners argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." But for the reasons set forth today in Grutter v. Bollinger, the Court has rejected these arguments of petitioners.

It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." This "'standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.'" To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs "narrowly tailored measures that further compelling governmental interests." We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant.

Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter*. But the fact that the implementation of a program capable of

providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. We further find that the admissions policy also violates Title VI and 42 U.S.C. §1981.[97]

Justice O'CONNOR, concurring. Justice BREYER joins this opinion.

Unlike the law school admissions policy the Court upholds today in Grutter v. Bollinger, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not "necessarily accor[d]" all diversity factors "the same weight," and the "weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class." But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. For these reasons, the record before us does not support the conclusion that the University of Michigan's admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting. Justice BREYER joins Part I of this opinion.

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. This insistence on "consistency" would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, but we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

In the wake "of a system of racial caste only recently ended," large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." But where race is considered "for the purpose of achieving equality," no automatic proscription is in order. For, as insightfully explained, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate de facto equality.

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups."

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), I see no constitutional infirmity. Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race.[98]

The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, 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.

In Fisher v. University of Texas at Austin, 570 U.S. 297 (2013), the Court did not reconsider *Grutter*, but held that a college or university must demonstrate that no race-neutral alternative could achieve diversity. The Court declared:

> Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."

> Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

The Court remanded the case to the United States Court of Appeals for the Fifth Circuit, which upheld the University of Texas program. In June 2016, the Court in a 4-3 decision (Justice Kagan was recused because of her involvement in the case as Solicitor General of the United States) upheld the Texas program.

FISHER v. UNIVERSITY OF TEXAS AT AUSTIN

136 S. Ct. 2196 (2016)

Justice KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. [In 1997], the Texas Legislature enacted H.B. 588, commonly known as the Top Ten Percent Law. As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

p. 826

The University implemented the Top Ten Percent Law in 1998. After *Grutter v. Bollinger* (2003), the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of *Grutter,* it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its

class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their [Academic Achievement Index, which is based on the student's grades and test scores] and [Personal Achievement Index] scores. [R]ace is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1-to-6 score, the "Personal Achievement Score" or PAS.

Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny." Strict scrutiny requires the university to demonstrate with clarity that its "'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'"

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. A university, *Fisher I* explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice."

III

[T]he University [has a] continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society."

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or

quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University. The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position.

Third, petitioner argues that considering race was not necessary because such consideration has had only a "'minimal impact' in advancing the [University's] compelling interest." Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African-American and Hispanic applicants. But the University submitted extensive

evidence of the many ways in which it already had intensified its outreach efforts to those students.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." "It is race consciousness, not blindness to race, that drives such plans." Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity. In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation."

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

Justice THOMAS, dissenting.

I write separately to reaffirm that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." That constitutional imperative does not change in the face of a "faddish theor[y]" that racial discrimination may produce "educational benefits." The Court was wrong to hold otherwise in *Grutter v. Bollinger* (2003). I would overrule *Grutter* and reverse the Fifth Circuit's judgment.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Something strange has happened since our prior decision in this case. In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. It pointed to a study showing that African-American, Hispanic, and Asian-American students were underrepresented in many classes. But UT has never shown that its race-conscious plan actually ameliorates

this situation. The University presents no evidence that its admissions officers, in administering the "holistic" component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented. Nor has UT explained why the underrepresentation of Asian-American students in many classes justifies its plan, which discriminates *against* those students.

At times, UT has claimed that its plan is needed to achieve a "critical mass" of African-American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in *Fisher I.*

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits *the wrong kind* of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic. As UT put it in its brief in *Fisher I,* the race-based component of its admissions plan is needed to admit "[t]he African-American or Hispanic child of successful professionals in Dallas."

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be *its burden* to show that the plan was narrowly tailored to serve compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.

[I]

UT's race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT's rationales as sufficient to meet its burden, the majority licenses UT's perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out.

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny. When UT adopted its challenged policy, it characterized its compelling interest as obtaining a "'critical mass'" of underrepresented minorities. The 2004 Proposal claimed that "[t]he use of race-neutral policies and programs has not been successful in

achieving a critical mass of racial diversity." But to this day, UT has not explained in anything other than the vaguest terms what it means by "critical mass." In fact, UT argues that it need not identify *any* interest more specific than "securing the educational benefits of diversity."

UT has insisted that critical mass is not an absolute number. Instead, UT prefers a deliberately malleable "we'll know it when we see it" notion of critical mass. It defines "critical mass" as "an adequate representation of minority students so that the . . . educational benefits that can be derived from diversity can actually happen," and it declares that it "will . . . know [that] it has reached critical mass" when it "see[s] the educational benefits happening." In other words: Trust us. This intentionally imprecise interest is designed to insulate UT's program from meaningful judicial review.

By accepting these amorphous goals as sufficient for UT to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending "'inherently suspect'" classifications.

Even assuming UT is correct that, under *Grutter,* it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. Narrow tailoring requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." Here, there is no evidence that race-blind, holistic review would not achieve UT's goals at least "about as well" as UT's race-based policy. In addition, UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors.

[II]

It is important to understand what is and what is not at stake in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

In Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014), the Court considered the constitutionality of a voter-passed initiative that prohibits affirmative action. In 2006, Michigan voters passed an initiative, Proposal 2, that amended the state

constitution to prohibit the state or its political subdivisions from discriminating or giving preference based on race or gender in education, contracting, or employment.

Two lawsuits were brought challenging this in the area of education. The district court upheld Proposal 2, but the Sixth Circuit declared it unconstitutional in a panel decision and then in an 8-7 *en banc* ruling.

The Sixth Circuit, relying on earlier Supreme Court decisions in Hunter v. Erickson and Washington v. Seattle School District No. 1, concluded that the initiative impermissibly restructured the political process along racial lines. Under Proposal 2, groups other than racial minorities can continue to go to the Michigan Board of Regents or the Michigan state legislature to obtain preferences in admissions. These bodies could award preferences to those who come from Michigan, or from a particular part of the state, or those whose parents attended the university, or those with particular interests.

However, if racial minorities want a preference in admission, they need to go through the arduous process of amending the state constitution. In other words, the initiative singles out race and says that it is to be treated differently from all other types of preferences. In practical reality, this means that racial minorities face a significant barrier to using the political process that is not imposed on other groups.

The Supreme Court, in a 6-2 decision without a majority opinion, reversed the Sixth Circuit and upheld the Michigan initiative. Justice Kennedy wrote a plurality opinion joined by Chief Justice Roberts and Justice Alito. Justice Kennedy said that no state is required to have affirmative action and it may eliminate it, including by an initiative. Justice Kennedy distinguished Hunter v. Erickson and Washington v. Seattle Schools, saying that they had the serious risk, if not purpose, of causing specific injuries on account of race. Justice Scalia concurred in the judgment, joined by Justice Thomas and said that *Hunter* and *Washington* are not distinguishable and should be overruled. Justice Breyer concurred in the judgment and stressed the importance of deference to the political process and the initiative process.

Justice Sotomayor wrote a lengthy, vehement dissent, joined by Justice Ginsburg. Justice Sotomayor argued that affirmative action is essential to remedy the history of discrimination and contended that Michigan's Proposal 2 impermissibly restructured the political process to the detriment of racial minorities.

DRAWING ELECTION DISTRICTS TO INCREASE MINORITY REPRESENTATION

One other form of affirmative action has received substantial attention from the Supreme Court: the use of race by the government to draw election districts so as to increase the likelihood that minority groups will be able to choose a representative. This might be done by grouping African Americans or Latinos together in a single district where they are the majority. Between 1993 and 1996, the Supreme Court decided four cases on the constitutionality of using race in districting to help racial minorities:[99] Shaw v. Reno, 509 U.S. 630 (1993), Miller v. Johnson, 515 U.S. 900 (1995), Shaw v. Hunt, 517 U.S. 899 (1996), and Bush v. Vera, 517 U.S. 952 (1996). In these cases, the Court addressed three major issues.

First, in each case, the Supreme Court ruled that the use of race in drawing election districts must meet strict scrutiny. Shaw v. Reno held, and each subsequent case reaffirmed, that the use of race in drawing election districts is permissible only if the government can show that it is necessary to achieve a compelling purpose. Although this is consistent with recent Supreme Court cases mandating strict scrutiny for government affirmative action efforts, the dissent made a strong argument that affirmative action in voting is different than affirmative action in areas such as employment or education. In the latter areas, racial classifications benefiting minorities arguably disadvantage a white individual who is not hired or admitted because of the affirmative action program. But in voting, every person still gets to vote and every vote is counted equally.[100]

Moreover, there is a long history of the government drawing district lines to keep racial and ethnic groups together. Justice Ginsburg, dissenting in Miller v. Johnson, observed, "To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example."[101]

Second, the Court indicated two ways in which it can be demonstrated that race was used in drawing election districts and thus strict scrutiny is to be applied. One is if a district has a "bizarre" shape that, in itself, makes clear that race was the basis for drawing the lines. Shaw v. Reno and Shaw v. Hunt involved an election district in North Carolina that had a quite unusual shape— it was very long and very narrow—and that had an African American majority. The Supreme Court said that it was apparent from the shape of the district that race had been used in drawing the district lines to create a majority black district.[102]

Alternatively, if the use of race in districting cannot be inferred from the shape of the district, strict scrutiny is justified if it is proven that race was a "predominant" factor in drawing the lines. In Miller v. Johnson, the Court considered an election district in Georgia that also had been created to provide a majority black district. Justice Kennedy, writing for the Court, said that if it is not obvious from the shape of the district that race was used in drawing its lines, the judiciary should use strict scrutiny if it is demonstrated that race was a "predominant" factor in districting.

Bush v. Vera, which involved congressional districts in Texas, reaffirmed this. Justice O'Connor, writing for a plurality, stated, "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race." The plurality concluded that strict scrutiny was appropriate in evaluating the Texas districts because the evidence demonstrated that racial motivations had a qualitatively greater influence on the drawing of district lines than political motivations.

Third, the Court considered what justifications are sufficient to meet strict scrutiny. For example, the Court held that §5 of the Voting Rights Act, which requires that the Justice Department approve changes in election systems in states where there has been a history of race discrimination with regard to voting, does not justify the use of race in districting.[103] The views of the Justice Department about the desirability of maximizing minority districts do not constitute a compelling interest sufficient to meet strict scrutiny.

The more difficult question is whether compliance with the 1982 Amendments to §2 of the Voting Rights Act is sufficient to meet strict scrutiny. Section two prohibits election systems, such as in districting, that have discriminatory effects against racial minorities. In Shaw v. Hunt and Bush v. Vera, the Court avoided the question of whether complying with this statutory provision is a compelling interest by finding that §2 would not have been violated by the failure to use race in districting in these cases.[104]

However, in *Bush*, Justice O'Connor wrote a separate opinion concurring in the judgment where she expressed the view that "compliance with the results test of §2 of the Voting Rights Act is a compelling state interest."[105] In Easley v. Cromartie, 532 U.S. 234, 237 (2001), the Supreme Court considered the constitutionality of districts for congressional seats in North Carolina. A three-judge federal district court held that North Carolina's legislature had impermissibly used race as the "predominant factor" in drawing the 12th Congressional District's boundaries. The Supreme Court, in a 5-to-4 decision, reversed the district court and found that its fact-finding was "clearly erroneous." Justice Breyer, writing for the majority, drew a distinction between the use of race for political reasons as opposed to for the purpose of affirmative action. The Court was clear that the government may use race as a factor in districting if the goal is political, such as protecting a safe seat for an incumbent or creating a district that has a majority of one political party.

But courts struggled with how to determine if districting was predominately based on race or political party affiliation. The Court returned to the issue in Cooper v. Harris, 137 S. Ct. 1455 (2017). Like many of the earlier cases, this involved drawing of congressional districts in North Carolina. Justice Kagan, writing for the majority, began by reviewing the well-established principles that "the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.' . . . Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." The Court reaffirmed that race can be used in districting to avoid violation of the Voting Rights Act so long as the state "had 'a strong basis in evidence' for concluding that the statute required its action. Or said otherwise, the State must establish that it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines."

The Court then addressed the issue that lower courts had struggled with since *Easley*: how to decide if districting was based on race or politics. The Court resolved this by saying that it does not matter; strict scrutiny is to be used if race is a predominant factor in districting, even if benefiting a political party was the most important consideration. The Court, albeit in a footnote, stated: "[T]hat inquiry is satisfied when legislators have 'place[d] a significant number of voters within or without' a district predominantly because of their race, regardless of their ultimate objective in taking that step. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. In other words, the sorting of voters on the grounds of their race remains

suspect even if race is meant to function as a proxy for other (including political) characteristics."

This seemingly ends the inquiry as to whether districting is done for racial reasons or for partisan advantage. So long as race is a predominant factor, strict scrutiny must be met.

D. GENDER CLASSIFICATIONS

There is a long history of discrimination against women in almost every aspect of society. Women were not accorded the right to vote until the Nineteenth Amendment was ratified in 1920. No woman ever has been elected president or vice president, and there have been only four women on the Supreme Court, all appointed since 1980. The share of female CEOs of Fortune 500 companies reached an all-time high of 6.4 percent in 2017[106] and overall, in 2018, female full-time, year-round workers made only 82 cents for every dollar earned by men, a gender wage gap of 20 percent.[107]

In examining gender discrimination under the Constitution, three issues are addressed. First, subsection 1 examines the level of scrutiny used for gender discrimination. Second, subsection 2 considers how gender discrimination can be proven. Finally, subsection 3 focuses on gender classifications benefiting women.

1. The Level of Scrutiny

It was not until 1971 that the Supreme Court first invalidated a gender classification.[108] This section begins by briefly reviewing the early cases approving gender discrimination and then considers the more recent cases holding that intermediate scrutiny is the appropriate test for evaluating gender classifications challenged under the Equal Protection Clause. The section concludes with United States v. Virginia, the most major recent Supreme Court decision concerning gender discrimination.

Throughout this section, the underlying question is what level of scrutiny should be used for gender classifications. Many of the factors that explain the use of strict scrutiny for racial classifications also apply to gender discrimination.[109] For example, there is a long history of discrimination against women in virtually every aspect of society. Ruth Bader Ginsburg, writing as a law professor, observed, "When the post-Civil War amendments were added to the Constitution, women were not accorded the vote. [Married] women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings. The fourteenth amendment left all that untouched."[110] As a result, gender classifications, like race and national origin classifications, are usually based on stereotypes rather than important government interests. Many purported biological differences that are invoked to justify legal distinctions are in reality just stereotypes, such as in the cases reviewed below where women were kept from being licensed as bartenders or from being automatically considered for jury service.

Also, sex, like race and national origin, is an immutable characteristic. Strict scrutiny is advocated because of the need for a strong presumption against laws that discriminate against people based on traits that were not chosen and cannot be changed. Gender, like race, is an immediately visible characteristic. Moreover, women, like racial minorities, tend to be significantly underrepresented in the political process.

Those who argue for intermediate rather than strict scrutiny for gender classifications make several arguments. In part, the argument is historical: The framers of the Fourteenth Amendment meant to outlaw only race discrimination.[111] Also, it is argued that biological differences between men and women make it more likely that gender classifications will be justified and thus less than strict scrutiny is appropriate to increase the chances that desirable laws will be upheld.

Also, it is claimed that women are a political majority who are not isolated from men and thus cannot be considered a discrete and insular minority. Professor Ely remarked, "I may be wrong in supposing that because women now are in a position to protect themselves they will, that we are thus unlikely to see in the future the sort of official gender discrimination that has marked our past. But if women don't protect themselves from sex discrimination in the future, . . . [i]t will be because for one reason or another—substantive disagreement or more likely the assignment of a low priority to the issue—they don't choose to."[112]

The debate over whether strict or intermediate scrutiny should be used for gender classifications is complicated by the affirmative action debate. Many of those who previously favored strict scrutiny for gender classifications now are concerned that such review would make it much more difficult for the government to engage in affirmative action to benefit women.[113] Because intermediate scrutiny is generally successful in challenging invidious discrimination against women, there is concern that the primary effect of strict scrutiny might be to limit programs that help women. There, of course, are still many advocates of strict scrutiny for gender and many who continue to believe that intermediate scrutiny is the best approach.

EARLY CASES APPROVING GENDER DISCRIMINATION

The Supreme Court first addressed a gender discrimination issue in 1872 in Bradwell v. The State of Illinois, 83 U.S. (16 Wall.) 130 (1872), which upheld an Illinois law that prohibited women from being licensed to practice law. A very short majority opinion ruled against Myra Bradwell without considering gender discrimination. Justice Miller, writing for the Court, rejected the argument that practicing law was a "privilege" of citizenship protected under the Privileges or Immunities Clause of the Fourteenth Amendment.

However, Justice Bradley, in a concurring opinion, directly addressed the claim of sex discrimination and opined that the state was justified in excluding women from the practice of law: "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 on exceptional cases." He concluded that "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."

In Minor v. Happersett, 88 U.S. 162 (1875), the Court held that it was constitutional for a state to allow only men to vote. This, of course, was reversed by the Nineteenth Amendment in 1920.

In several cases during the first third of the twentieth century, the Supreme Court upheld laws that expressly discriminated based on gender. During this period of constitutional history, often referred to as the *Lochner* era, the Supreme Court aggressively protected freedom of contract and invalidated many regulatory laws for violating that right.[114] However, the Court was much more willing to uphold such laws if women were being regulated. For example, although Lochner v. New York declared unconstitutional a maximum hours law for bakers,[115] three years later, in Muller v. Oregon, 208 U.S. 412 (1908), the Supreme Court upheld a maximum hours law for women employed in factories.[116] The Court in *Muller* said, "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."

Following this rationale, in Radice v. New York, 264 U.S. 292 (1924), the Court upheld a state law that prohibited women from being employed in restaurants between 10:00 P.M. and 6:00 A.M. However, the Court initially rejected a state law that created a minimum wage for women. In Adkins v. Children's Hospital, 261 U.S. 525 (1923), the Court said that "while the physical differences must be recognized in appropriate cases . . . women of mature age . . . may [not] be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." The Court later overruled this holding and in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937)—a key case signaling the end of the *Lochner* era—upheld a minimum wage law for women, declaring, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"

Even after World War II and the entrance of many women into the labor market, the Supreme Court continued to allow gender discrimination based on stereotypes. In Goesaert v. Cleary, 335 U.S. 464 (1948), the Supreme Court upheld a Michigan law that prevented the licensing of women as bartenders unless the woman was the wife or daughter of a male who owned the bar where she would work. Justice Frankfurter declared that "Michigan could, beyond question, forbid all women from working behind a bar." He said that "the vast changes in the social and legal position of women . . . [do] not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic." The Court said that the law's discrimination among women was permissible because "the line they have drawn is not without a basis in reason"; "the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."

In 1961, in Hoyt v. Florida, 368 U.S. 57 (1961), the Court upheld a state law that made men eligible for jury service unless they requested and were granted an exception, whereas women were automatically exempted unless they waived it and expressed a desire to be included on the jury rolls. The Court applied the rational basis test and upheld the law. The Court said that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of

community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." Thus, a state could exempt women "from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."

THE EMERGENCE OF INTERMEDIATE SCRUTINY

In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court for the first time invalidated a gender classification, but the Court professed to apply only rational basis review. An Idaho law specified the hierarchy of persons to be appointed as administrators of an estate when a person died intestate. Specifically, the law created eleven categories in rank order—parents were first, children second, and so on—and said that if there were two competing applicants in the same category, the male was to be preferred over the female.

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The Court articulated the standard of review in traditional rational basis terms. It said, "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." The Supreme Court said that the issue was whether gender had a rational relationship to the ability to administer the estate. Obviously, gender is irrelevant, and the Court held the law unconstitutional, concluding, "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex."

Although the Court purported to be using just the rational basis test and did not express the view that gender was a suspect classification, its reasoning was not characteristic of rational basis review. If the law had said, "When there are two people in a category who are equally qualified, one will be chosen by random selection," that surely would have been permissible under rational basis review. Therefore, the use of gender had to have been regarded by the Court as worse than random selection and an inappropriate ground to use to simplify administration. In other words, the Court implicitly had to regard gender as an impermissible basis for government decisions.

In Frontiero v. Richardson, four justices took the position that gender classifications should be subjected to strict scrutiny.

FRONTIERO v. RICHARDSON

411 U.S. 677 (1973)

Justice BRENNAN announced the judgment of the Court in an opinion in which Justice DOUGLAS, Justice WHITE, and Justice MARSHALL join.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a "dependent" for the purposes of obtaining increased quarters

allowances and medical and dental benefits on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed (1971).

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre–Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, 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, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . . " And what differentiates sex from such non-suspect 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. As a result, statutory distinctions between the sexes

often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under [federal law] a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives.

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

Justice STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution.

Justice POWELL, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are

"inherently suspect and must therefore be subjected to close judicial scrutiny." It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

In Stanton v. Stanton, 421 U.S. 7 (1975), the Court declared unconstitutional a Utah law that required that parents support their female children until age 18 but that male children be supported until age 21. The Court said that the statute was based on "old notions" about social roles; "[no] longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding." Again, the Court decided without a holding as to the level of scrutiny. In fact, the Court said that the law was unconstitutional "under any test—compelling state interest, or rational basis, or something in between."

Finally, in 1976, in Craig v. Boren, the Supreme Court agreed on intermediate scrutiny as the appropriate level of review for gender classifications.

CRAIG v. BOREN

429 U.S. 190 (1976)

Justice BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

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.

We accept for purposes of discussion the District Court's identification of the objective underlying §§241 and 245 as the enhancement of traffic safety. Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18- to 20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period. Similarly, youths aged 17-21 were found to be overrepresented among those

killed or injured in traffic accidents, with males again numerically exceeding females in this regard. Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts. Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence." Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol.

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18- to 20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here. Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer, albeit apparently not of the diluted 3.2% variety, reached results that hardly can be viewed as impressive in justifying either a gender or age classification.

We conclude that the gender-based differential contained in [Oklahoma law] constitutes a denial of the equal protection of the laws to males aged 18-20.

Justice REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in Frontiero v. Richardson (1973), from their view that sex is a "suspect" classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis and I believe that it is constitutional under that analysis.

The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

One survey of arrest statistics assembled in 1973 indicated that males in the 18-20 age group were arrested for "driving under the influence" almost 18 times as often as their female counterparts, and for "drunkenness" in a ratio of almost 10 to 1. Accepting, as the Court does, appellants' comparison of the total figures with 1973 Oklahoma census data, this survey indicates a 2% arrest rate among males in the age group, as compared to a .18% rate among females.

Other surveys indicated (1) that over the five-year period from 1967 to 1972, nationwide arrests among those under 18 for drunken driving increased 138%, and that 93% of all persons arrested for drunken driving were male; (2) that youths in the 17-21 age group were overrepresented among those killed or injured in Oklahoma traffic accidents, that male casualties substantially exceeded female, and that deaths in this age group continued to rise while overall traffic deaths declined; (3) that over three-fourths of the drivers under 20 in the Oklahoma City area are males, and that each of them, on average, drives half again as many miles per year as their female counterparts; (4) that four-fifths of male drivers under 20 in the Oklahoma City area state a drink preference for beer, while about three-fifths of female drivers of that age state the same preference; and (5) that the percentage of male drivers under 20 admitting to drinking within two hours of driving was half again larger than the percentage for females, and that the percentage of male drivers of that age group with a blood alcohol content greater than .01% was almost half again larger than for female drivers.

The Court's criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies, and are

entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents.

The Oklahoma Legislature could have believed that 18- to 20-year-old males drive substantially more, and tend more often to be intoxicated than their female counterparts; that they prefer beer and admit to drinking and driving at a higher rate than females; and that they suffer traffic injuries out of proportion to the part they make up of the population. Under the appropriate rational-basis test for equal protection, it is neither irrational nor arbitrary to bar them from making purchases of 3.2% beer, which purchases might in many cases be made by a young man who immediately returns to his vehicle with the beverage in his possession. There being no violation of either equal protection or due process, the statute should accordingly be upheld.

Since Craig v. Boren, the Supreme Court, on many occasions, has reaffirmed and applied intermediate scrutiny for gender classifications.[117] For example, in Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Court expressly used intermediate scrutiny to invalidate a Louisiana law that gave a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent. Moreover, as described below in subsection 3, the Court has held that intermediate scrutiny is to be used both for gender classifications discriminating against women and those discriminating against men.

In United States v. Virginia, the Supreme Court used intermediate scrutiny in declaring unconstitutional the exclusion of women by the Virginia Military Institute (VMI). However, Justice Ginsburg's majority opinion also emphasized that there must be an "exceedingly persuasive justification" for gender classifications.

UNITED STATES v. VIRGINIA

518 U.S. 515 (1996)

Justice GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

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

In response to the Fourth Circuit's ruling [that Virginia had violated equal protection], Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission—to produce "citizen-soldiers"—the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources.

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. Mary Baldwin's faculty holds "significantly fewer Ph.D.'s than the faculty at VMI," and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition.

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, if VMI's "unique" situation, as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?

IV

We note, once again, the core instruction of this Court's pathmarking decisions: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Frontiero v. Richardson (1973). Through a

century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. "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), to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. 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

Virginia challenges 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, 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.

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."

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, it is also probable that "many men would not want to be educated in such an environment." Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," once routinely used to deny rights or opportunities.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals "'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril.'"

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps. Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" that must be the solid base for any gender-defined classification.

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.

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." The constitutional violation in this suit is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy.

The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women." 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, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future."

Justice SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.

Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States —the old one—takes no sides in this educational debate, I dissent.

2. Proving the Existence of a Gender Classification

There are two major ways of proving a gender classification; they are identical to the two methods of demonstrating a racial classification discussed above. First, the gender classification can exist on the face of the law; that is, the law in its very terms draws a distinction among people based on gender. All of the cases discussed thus far concerning gender discrimination are of this type. For example, Craig v. Boren involved a facial gender classification in that the Oklahoma law provided that women could buy low-alcohol beer at age 18, but men could not until age 21. Likewise, in United States v. Virginia, the Virginia policy that excluded women from attending the Virginia Military Institute was a classification on the face of the law.

Second, if a law is facially gender neutral, proving a gender classification requires demonstrating that there is both a discriminatory impact to the law and a discriminatory purpose behind it. In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), presented in section C, the Supreme Court upheld a state law that gave a preference in hiring to veterans even though it had a substantial discriminatory impact against women. Helen Feeney repeatedly took civil service exams for particular positions and received among the highest scores in the state, but was placed behind lists of veterans with lower scores. At the time the litigation was commenced, "over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans."

Nonetheless, the Supreme Court rejected the claim of gender discrimination. The Court said that the law providing a preference for veterans was gender-neutral and that discriminatory impact is not sufficient to prove the existence of sex-based classification; there also must be proof of a discriminatory purpose. The Court concluded that "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts civil service." The ways of proving a discriminatory purpose based on gender are identical to the ways of proving a discriminatory racial purpose, described above.

WHEN IS IT "DISCRIMINATION"?

In Geduldig v. Aiello, the Court considered whether the law's failure to take into account biological differences between men and women constitutes gender discrimination.

GEDULDIG v. AIELLO

417 U.S. 484 (1974)

Justice STEWART delivered the opinion of the Court.

For almost 30 years California has administered a disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining "disability," excludes from coverage certain disabilities resulting from pregnancy.

[Under California law] an individual is eligible for disability benefits if, during a one-year base period prior to his disability, he has contributed one percent of a minimum income of $300 to the Disability Fund. In the event he suffers a compensable disability, the individual can receive a "weekly benefit amount" of between $25 and $105, depending on the amount he earned during the highest quarter of the base period. In return for his one-percent contribution to the Disability Fund, the individual employee is insured against the risk of disability stemming from a substantial number of "mental or physical illness[es] and mental or physical injur[ies]."

It is not every disabling condition, however, that triggers the obligation to pay benefits under the program. As already noted, for example, any disability of less than eight days' duration is not compensable, except when the employee is hospitalized. Conversely, no benefits are payable for any single disability beyond 26 weeks. Further, disability is not compensable if it results from the individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath. Finally, the Unemployment Insurance Code excludes from coverage certain disabilities that are attributable to pregnancy. It is this provision that is at issue in the present case.

It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts. Since the program was instituted in 1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits. The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees.

In ordering the State to pay benefits for disability accompanying normal pregnancy and delivery, the District Court acknowledged the State's contention "that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included." There is considerable disagreement between the parties with respect to how great the increased costs would actually be, but they would clearly be substantial.

We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure. Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contributions exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time,

addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . .” Williamson v. Lee Optical Co. (1955). Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has. The State has a legitimate interest in maintaining the self-supporting nature of its insurance program.

These policies provide an objective and wholly noninvidious basis for the State’s decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment.

Justice Brennan, with whom Justice Douglas and Justice Marshall join, dissenting.

Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Code, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for the delivery of the child and for postpartum care. In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

Congress effectively overruled *Geduldig* by statute when it enacted the Pregnancy Discrimination Act, which defined sex discrimination to include pregnancy discrimination and which prohibits discrimination on that basis.[118] Although *Geduldig*'s impact has been negated in the area of pregnancy by the Pregnancy Discrimination Act, its reasoning is still applied by the Court in other contexts. In Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), the Supreme Court considered whether those blocking access to abortion clinics were engaged in a form of gender discrimination in violation of federal civil rights statutes. The Supreme Court, in an opinion by Justice Scalia, expressly invoked *Geduldig* in rejecting the claim that there was a gender-based animus behind the protests. Scalia said that there were two categories of individuals: persons protesting and persons receiving abortions. The Court said that there was not gender discrimination because women were both in the former category, protestors, and in the latter category, those seeking abortions.

3. Gender Classifications Benefiting Women

Interestingly, the majority of Supreme Court cases concerning gender discrimination have involved laws that benefit women and disadvantage men.[119] Two principles emerge from these decisions. First, gender classifications benefiting women based on role stereotypes generally will not be allowed. Second, gender classifications benefiting women designed to remedy past discrimination and differences in opportunity generally are permitted.

GENDER CLASSIFICATIONS BASED ON ROLE STEREOTYPES

The Supreme Court frequently has invalidated laws that benefit women and disadvantage men when the Court perceives the law as based on stereotypical assumptions about gender roles. Many of these laws were based on the stereotype of women being economically dependent on their husbands but men being economically independent of their wives.

ORR v. ORR

440 US. 268 (1979)

Justice BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.

In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme "provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. "To withstand scrutiny" under the Equal Protection Clause, "'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"

Appellant views the Alabama alimony statutes as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens. We agree, as he urges, that prior cases settle that this purpose cannot sustain the statutes.

The opinion of the Alabama Court of Civil Appeals suggests other purposes that the statute may serve. Its opinion states that the Alabama statutes were "designed" for "the wife of a broken marriage who needs financial assistance." This may be read as asserting either of two legislative objectives. One is a legislative purpose to provide help for needy spouses, using sex as a proxy for need. The other is a goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce. We concede, of course, that assisting needy spouses is a legitimate and important governmental objective. We have also recognized "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women . . . as . . . an important governmental objective." It only remains, therefore, to determine whether the classification at issue here is "substantially related to achievement of those objectives."

But in this case, even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would "not adequately justify the salient features of" Alabama's statutory scheme. Under the statute, individualized hearings at which the parties' relative financial circumstances are considered already occur. There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy. Similarly, since individualized hearings can determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex. "Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids," and the effort to help those women would not in any way be compromised.

Moreover, use of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation.

Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

Similarly, the Supreme Court, on several occasions, has declared unconstitutional many laws that automatically allowed women economic benefits, such as when their husbands died, but permitted men the same benefits only if they proved dependence on their wives' income. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Supreme Court deemed unconstitutional a provision of the Social Security Act that allowed a widowed mother, but not a widowed father, to receive benefits based on the earnings of the deceased spouse. The Court said that the law was based on the stereotype "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."

The Court applied *Weinberger* in Califano v. Goldfarb, 430 U.S. 199 (1977), to hold unconstitutional a provision in the Federal Old-Age, Survivors, and Disability Insurance Benefits program, whereby a woman automatically would receive benefits based on the earnings of her husband, but a man would receive such benefits only if he could prove that he received at least half of his support from his wife. The Court declared the law unconstitutional because it was based, at least in part, on a "presumption that wives are usually dependent." The Court said that "such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits."

In Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980), the Court applied the same principle to rule unconstitutional a state law that automatically allowed widows benefits, but only allowed widowers benefits if they proved that they were dependent on their wives' income or were physically incapacitated. In all of these cases—*Orr*, *Weinberger*, *Goldfarb*, and *Wengler*—the Court rejected laws that benefited women because they were based on the stereotype of economically dependent women and economically independent men.

Other stereotypes also have been rejected as a sufficient basis for gender classifications benefiting women. For example, in Mississippi University for Women v. Hogan, the Court declared unconstitutional a state policy of operating a nursing school that excluded men.

MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN

458 U.S. 718 (1982)

Justice O'Connor delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

I

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women. Mississippi maintains no other single-sex public

university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females.

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program. Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex.

II

Our decisions establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female.

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to

men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, that the presence of men in the classroom would not affect the performance of the female nursing students, and that men in coeducational nursing schools do not dominate the classroom. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Justice POWELL, with whom Justice REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must travel to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of "inconvenience." This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomalous. And ultimately the anomaly reveals legal error—that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an additional choice for women.

By applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause. It prohibits the States from providing

women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the victims of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else.

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.

Thus, in all of these cases the Supreme Court invalidated laws benefiting women because they were based on stereotypes about women and their roles in the family and the economy. Yet in some cases the Court has upheld laws benefiting women even though they seem to be based on stereotypes. Michael M. v. Superior Court and Rostker v. Goldberg, which follow, both are cases in which the Court upheld gender classifications that appear to rest on stereotypes.

MICHAEL M. v. SUPERIOR COURT OF SONOMA COUNTY

450 US. 464 (1981)

Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice STEWART, and Justice POWELL joined.

The question presented in this case is whether California's "statutory rape" law, §261.5 of the Cal. Penal Code Ann. violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17½-year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of §261.5. The evidence, adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½-year-old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that §261.5 unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner's request for relief and petitioner sought review in the Supreme Court of California. The Supreme Court held that "section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section."

[T]he fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct. Precisely why the legislature desired that result is of course somewhat less clear. This Court has long recognized that "[i]nquiries into congressional motives or purposes are a hazardous matter," United States v. O'Brien (1968), and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State. Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion. And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female. We hold that such a statute is sufficiently related to the State's objectives to pass constitutional muster. Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.

In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.

Contrary to the petitioner's assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.

Justice BRENNAN, with whom Justices WHITE and MARSHALL join, dissenting.

Applying the analytical framework provided by our precedents, I am convinced that there is only one proper resolution of this issue: the classification must be declared unconstitutional. I fear that the Court reaches the opposite result by placing too much emphasis on the desirability of achieving the State's asserted statutory goal—prevention of teenage pregnancy—and not enough emphasis on the fundamental question of whether the sex-based discrimination in the California statute is substantially related to the achievement of that goal.

The State of California vigorously asserts that the "important governmental objective" to be served by §261.5 is the prevention of teenage pregnancy. It claims that its statute furthers this goal by deterring sexual activity by males—the class of persons it considers more responsible for causing those pregnancies. But even assuming that prevention of teenage pregnancy is an important governmental objective and that it is in fact an objective of §261.5, California still has the burden of proving that there are fewer teenage pregnancies under its gender-based statutory rape law than there would be if the law were gender neutral. To meet this burden, the State must show that because its statutory rape law punishes only males, and not females, it more effectively deters minor females from having sexual intercourse.

However, a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under Craig v. Boren. Rather, the State must produce evidence that will persuade the court that its assertion is true. The State has not produced such evidence in this case.

Moreover, there are at least two serious flaws in the State's assertion that law enforcement problems created by a gender-neutral statutory rape law would make such a statute less effective than a gender-based statute in deterring sexual activity. First, the experience of other jurisdictions, and California itself, belies the plurality's conclusion that a gender-neutral statutory rape law "may well be incapable of enforcement." There are now at least 37 States that have enacted gender-neutral statutory rape laws. Although most of these laws protect young persons (of either sex) from the sexual exploitation of older individuals, the laws of Arizona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct. California has introduced no evidence that those States have been handicapped by the enforcement problems the plurality finds so persuasive. Surely, if those States could provide such evidence, we might expect that California would have introduced it.

The second flaw in the State's assertion is that even assuming that a gender-neutral statute would be more difficult to enforce, the State has still not shown that those

enforcement problems would make such a statute less effective than a gender-based statute in deterring minor females from engaging in sexual intercourse. Common sense, however, suggests that a gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators. Even if fewer persons were prosecuted under the gender-neutral law, as the State suggests, it would still be true that twice as many persons would be subject to arrest. The State's failure to prove that a gender-neutral law would be a less effective deterrent than a gender-based law, like the State's failure to prove that a gender-neutral law would be difficult to enforce, should have led this Court to invalidate §261.5.

Justice STEVENS, dissenting.

Local custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers. The empirical evidence cited by the plurality demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.

I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. The societal interests in reducing the incidence of venereal disease and teenage pregnancy are sufficient, in my judgment, to justify a prohibition of conduct that increases the risk of those harms. My conclusion that a nondiscriminatory prohibition would be constitutional does not help me answer the question whether a prohibition applicable to only half of the joint participants in the risk-creating conduct is also valid.

In my judgment, the fact that a class of persons is especially vulnerable to a risk that a statute is designed to avoid is a reason for making the statute applicable to that class. The argument that a special need for protection provides a rational explanation for an exemption is one I simply do not comprehend. In this case, the fact that a female confronts a greater risk of harm than a male is a reason for applying the prohibition to her—not a reason for granting her a license to use her own judgment on whether or not to assume the risk. Surely, if we examine the problem from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt 50% of the potential violators. And, if we view the government's interest as that of a parens patriae seeking to protect its subjects from harming themselves, the discrimination is actually perverse. Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification.

Finally, even if my logic is faulty and there actually is some speculative basis for treating equally guilty males and females differently, I still believe that any such speculative justification would be outweighed by the paramount interest in evenhanded enforcement of the law. A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.

ROSTKER v. GOLDBERG

453 U.S. 57 (1981)

Justice REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

I

Congress is given the power under the Constitution "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." Pursuant to this grant of authority Congress has enacted the Military Selective Service Act. Section 3 of the Act, empowers the President, by proclamation, to require the registration of "every male citizen" and male resident aliens between the ages of 18 and 26. The purpose of this registration is to facilitate any eventual conscription: pursuant to §4(a) of the Act, those persons required to register are liable for training and service in the Armed Forces. The MSSA registration provision serves no other purpose beyond providing a pool for subsequent induction.

p. 863

II

Whenever called upon to judge the constitutionality of an Act of Congress—"the gravest and most delicate duty that this Court is called upon to perform," Blodgett v. Holden (1927) (Holmes, J.)—the Court accords "great weight to the decisions of Congress." The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.

In Gilligan v. Morgan (1973), the Court noted: "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."

No one could deny that under the test of Craig v. Boren the Government's interest in raising and supporting armies is an "important governmental interest." Congress and its Committees carefully considered and debated two alternative means of furthering that interest: the first was to register only males for potential conscription, and the other was to register both sexes. Congress chose the former alternative. When that decision is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws.

III

This case is quite different from several of the gender-based discrimination cases we have considered in that, despite appellees' assertions, Congress did not act "unthinkingly" or "reflexively and not for any considered reason." The question of registering women for the draft not only received considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee. Hearings held by both Houses of Congress in response to the President's request for authorization to register women adduced extensive testimony and evidence concerning the issue. These hearings built on other hearings held the previous year addressed to the same question. The House declined to provide for the registration of women when it passed the Joint Resolution allocating funds for the Selective Service System. When the Senate considered the Joint Resolution, it defeated, after extensive debate, an amendment which in effect would have authorized the registration of women. As noted earlier, Congress in H. J. Res. 521 only authorized funds sufficient to cover the registration of males. The foregoing clearly establishes that the decision to exempt women from registration was not the "accidental by-product of a traditional way of thinking about females."

p. 864

The MSSA established a plan for maintaining "adequate armed strength . . . to insure the security of [the] Nation." Registration is the first step "in a united and continuous process designed to raise an army speedily and efficiently." Congress provided for the reactivation of registration in order to "provid[e] the means for the early delivery of inductees in an emergency." Any assessment of the congressional purpose and its chosen means must therefore consider the registration scheme as a prelude to a draft in a time of national emergency. Any other approach would not be testing the Act in light of the purposes Congress sought to achieve.

Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. The Army and Marine Corps preclude the use of women in combat as a matter of established policy. Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration.

The existence of the combat restrictions clearly indicates the basis for Congress's decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them. The Senate Report [stated]: "In the Committee's view, the starting point for any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat. . . . The policy precluding the use of women in combat is, in the Committee's view, the most important reason, for not including women in a registration system."

The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men

and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.

Congress's decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress's purpose in authorizing registration. In light of the foregoing, we conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.

Justice WHITE, with whom Justice BRENNAN joins, dissenting.

I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say, that Congress concluded as much and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary. The Court's position in this regard is most unpersuasive. I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled, with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality. It should not be ascribed to Congress, particularly in the face of the testimony of military authorities, hereafter referred to, that there would be a substantial number of positions in the services that could be filled by women both in peacetime and during mobilization, even though they are ineligible for combat.

I would also have little difficulty agreeing to a reversal if all the women who could serve in wartime without adversely affecting combat readiness could predictably be obtained through volunteers. In that event, the equal protection component of the Fifth Amendment would not require the United States to go through, and a large segment of the population to be burdened with, the expensive and essentially useless procedure of registering women. But again I cannot agree with the Court, that Congress concluded or that the legislative record indicates that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization. On the contrary, the record as I understand it, supports the District Court's finding that the services would have to conscript at least 80,000 persons to fill positions for which combat-ready men would not be required. The consistent position of the Defense Department representatives was that their best estimate of the number of women draftees who could be used productively by the services in the event of a major mobilization would be approximately 80,000 over the first six months. Except for a single, unsupported, and ambiguous statement in the Senate Report to the effect that "women volunteers would fill the requirements for women," there is no indication that Congress rejected the Defense Department's figures or relied upon an alternative set of figures.

The Court also submits that because the primary purpose of registration and conscription is to supply combat troops and because the great majority of noncombat

positions must be filled by combat-trained men ready to be rotated into combat, the absolute number of positions for which women would be eligible is so small as to be de minimis and of no moment for equal protection purposes, especially in light of the administrative burdens involved in registering all women of suitable age. There is some sense to this; but at least on the record before us, the number of women who could be used in the military without sacrificing combat readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all.

As I understand the record, then, in order to secure the personnel it needs during mobilization, the Government cannot rely on volunteers and must register and draft not only to fill combat positions and those noncombat positions that must be filled by combat-trained men, but also to secure the personnel needed for jobs that can be performed by persons ineligible for combat without diminishing military effectiveness. The claim is that in providing for the latter category of positions, Congress is free to register and draft only men. I discern no adequate justification for this kind of discrimination between men and women. Accordingly, with all due respect, I dissent.

GENDER CLASSIFICATIONS BENEFITING WOMEN AS A REMEDY

The Court has indicated that gender classifications benefiting women will be allowed when they are designed to remedy past discrimination or differences in opportunity. Califano v. Webster is an example.

CALIFANO v. WEBSTER

430 U.S. 313 (1977)

PER CURIAM.

Under §215 of the Social Security Act, old-age insurance benefits are computed on the basis of the wage earner's "average monthly wage" earned during his "benefit computation years" which are the "elapsed years" (reduced by five) during which the wage earner's covered wages were highest. Until a 1972 amendment, "elapsed years" depended upon the sex of the wage earner. Section 215(b)(3) prescribed that the number of "elapsed years" for a male wage earner would be three higher than for an otherwise similarly situated female wage earner; for a male, the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which he attained age 65; for a female the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which she attained age 62. Thus, a male born in 1900 would have 14 "elapsed years" on retirement at age 65 but a female born in the same year would have only 11. Accordingly, a female wage earner could exclude from the computation of her "average monthly wage" three more lower earning years than a similarly situated male wage earner could exclude. This would result in a slightly higher "average monthly wage" and a correspondingly higher level of monthly old-age benefits for the retired female wage earner.

To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren (1976). Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.

The more favorable treatment of the female wage earner enacted here was not a result of "archaic and overbroad generalizations" about women, or of "the roletyping society has long imposed" upon women, such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents. Rather, "the only discernible purpose of [§215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women."

The challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.

Another example of the Court allowing gender classifications benefiting women to compensate for differences in opportunity is Schlesinger v. Ballard, 419 U.S. 498 (1975). In Schlesinger v. Ballard, the Court upheld a Navy regulation that required the discharge of male officers who had gone 9 years without a promotion but allowed women to remain 13 years without a promotion. The Court decided that this was constitutional because men had more opportunities for promotion than women. Justice Stewart, writing for the Court, explained, "Congress may quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with fair and equitable career advancement programs."

Thus far, the Court has not considered a constitutional challenge to an affirmative action program designed to benefit women. Although intermediate scrutiny is the test for all gender-based classifications, many of the same issues will arise as in the context of race-based affirmative action, including what interests justify affirmative action and what techniques are permissible.

CLASSIFICATIONS BENEFITING WOMEN BECAUSE OF BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN

In Nguyen v. Immigration & Naturalization Service, below, the Court allows a third type of gender classification: gender classifications benefiting women because of biological differences between men and women. The Court allows a difference in INS rules favoring mothers over fathers because of the greater certainty as to the identity of the

mother as compared to the father and the greater opportunity that mothers have in establishing a relationship with their children.

Notice in reading the decision some of the key differences between the majority and the dissent: The majority articulates the test as intermediate scrutiny, whereas the dissent emphasizes that there also must be an "exceedingly persuasive justification" for the gender classification; the dissent emphasizes that only "actual" legislative purposes are sufficient, whereas the majority does not; and the majority and the dissent differ as to whether the law is based on stereotypes or biological differences between men and women.

NGUYEN v. IMMIGRATION & NATURALIZATION SERVICE

533 U.S. 53 (2001)

Justice KENNEDY delivered the opinion of the Court.

Title 8 U.S.C. §1409 governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. The question before us is whether the statutory distinction is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.

I

Petitioner Tuan Ahn Nguyen was born in Saigon, Vietnam, on September 11, 1969, to copetitioner Joseph Boulais and a Vietnamese citizen. Boulais and Nguyen's mother were not married. Boulais always has been a citizen of the United States, and he was in Vietnam under the employ of a corporation. After he and Nguyen's mother ended their relationship, Nguyen lived for a time with the family of Boulais' new Vietnamese girlfriend. In June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais.

In 1998, while the matter was pending, [Nguyen's] father obtained an order of parentage from a state court, based on DNA testing. By this time, Nguyen was 28 years old. The Board dismissed Nguyen's appeal, rejecting his claim to United States citizenship because he had failed to establish compliance with 8 U.S.C. §1409(a), which sets forth the requirements for one who was born out of wedlock and abroad to a citizen father and a noncitizen mother.

Nguyen and Boulais appealed to the Court of Appeals for the Fifth Circuit, arguing that §1409 violates equal protection by providing different rules for attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with American citizenship is the mother or the father. The court rejected the constitutional challenge.

We hold that §1409(a) is consistent with the constitutional guarantee of equal protection.

II

The general requirement for acquisition of citizenship by a child born outside the United States and its outlying possessions and to parents who are married, one of whom is a citizen and the other of whom is an alien, is set forth in 8 U.S.C. §1401(g). The statute provides that the child is also a citizen if, before the birth, the citizen parent had been physically present in the United States for a total of five years, at least two of which were after the parent turned 14 years of age.

As to an individual born under the same circumstances, save that the parents are unwed, §1409(a) sets forth the following requirements where the father is the citizen parent and the mother is an alien:

1. a blood relationship between the person and the father is established by clear and convincing evidence,
2. the father had the nationality of the United States at the time of the person's birth,
3. the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
4. while the person is under the age of 18 years—
    (A) the person is legitimated under the law of the person's residence or domicile,
    (B) the father acknowledges paternity of the person in writing under oath, or
    (C) the paternity of the person is established by adjudication of a competent court.

When the citizen parent of the child born abroad and out of wedlock is the child's mother, the requirements for the transmittal of citizenship are described in §1409(c):

> (c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Section 1409(a) thus imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother.

III

For a gender-based classification to withstand equal protection scrutiny, it must be established "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." United States v. Virginia (1996). For reasons to follow, we conclude §1409 satisfies this standard. Given that determination, we need not decide

whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power.

The statutory distinction relevant in this case, then, is that §1409(a)(4) requires one of three affirmative steps to be taken if the citizen parent is the father, but not if the citizen parent is the mother: legitimation; a declaration of paternity under oath by the father; or a court order of paternity. Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship, but not a maternal one, is justified by two important governmental objectives. We discuss each in turn.

A

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective. Section 1409(a)(4)'s provision of three options for a father seeking to establish paternity—legitimation, paternity oath, and court order of paternity—is designed to ensure an acceptable documentation of paternity.

Petitioners argue that the requirement of §1409(a)(1), that a father provide clear and convincing evidence of parentage, is sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. Section 1409(a)(1) does not actually mandate a DNA test, however. The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress. The requirement of §1409(a)(4) represents a reasonable conclusion by the legislature that the satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship. Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers.

B

The second important governmental interest furthered in a substantial manner by §1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday

ties that provide a connection between child and citizen parent and, in turn, the United States. In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.

The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.

When we turn to the conditions which prevail today, we find that the passage of time has produced additional and even more substantial grounds to justify the statutory distinction. The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners' argument, which would mandate, contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Canada and Mexico. Visits to Canada and Mexico add to this figure almost 34 million additional visits. And the average American overseas traveler spent 15.1 nights out of the United States in 1999.

Principles of equal protection do not require Congress to ignore this reality. To the contrary, these facts demonstrate the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth. Indeed, especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility. Even if a father knows of the fact of conception, moreover, it does not follow that he will be present at the birth of the child. Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet. Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter.

The importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test. The fact of paternity can be established even without the father's knowledge, not to say his presence. Paternity can be established by taking DNA samples even from a few strands of hair, years after the birth. Yet scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority.

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process. If citizenship is to be conferred by the unwitting means petitioners urge, so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination. Congress has not taken that path but has instead chosen, by means of §1409, to ensure in the case of father and child the opportunity for a relationship to develop, an opportunity which the event of birth itself provides for the mother and child. It should be unobjectionable for Congress to require some evidence of a minimal opportunity for the development of a relationship with the child in terms the male can fulfill.

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Petitioners and their amici argue in addition that, rather than fulfilling an important governmental interest, §1409 merely embodies a gender-based stereotype. Although the above discussion should illustrate that, contrary to petitioners' assertions, §1409 addresses an undeniable difference in the circumstance of the parents at the time a child is born, it should be noted, furthermore, that the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting.

In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex. The Court today confronts another statute that classifies individuals on the basis of their sex. While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U.S.C. §1409(a)(4)—i.e., because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would reverse the judgment of the Court of Appeals.

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I

Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's "long and unfortunate history of sex discrimination." Sex-based generalizations both reflect and reinforce "fixed notions concerning the roles and abilities of males and females."

For these reasons, a party who seeks to defend a statute that classifies individuals on the basis of sex "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." The defender of the classification meets this burden "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"

Heightened scrutiny does not countenance justifications that "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational. Moreover, overbroad sex-based generalizations are impermissible even when they enjoy empirical support.

The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review. But because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.

II

The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways.

For example, the majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of §1409(a)(4). The Court also does not always explain adequately the importance of the interests that it claims to be served by the provision. The majority also fails carefully to consider whether the sex-based classification is being used impermissibly "as a proxy for other, more germane bases of classification," and instead casually dismisses the relevance of available sex-neutral alternatives. And, contrary to the majority's conclusion, the fit between the means and ends of §1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny. In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

A

According to the Court, "[t]he first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists." The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of §1409(a)(4). Assuming that Congress actually had this purpose in mind in enacting parts of §1409(a)(4), the INS does not appear to rely on this interest in its effort to sustain §1409(a)(4)'s sex-based classification. In light of the reviewing court's duty to "determine whether the proffered justification is 'exceedingly persuasive,'" this disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least.

The gravest defect in the Court's reliance on this interest, however, is the insufficiency of the fit between §1409(a)(4)'s discriminatory means and the asserted end. Section 1409(c) imposes no particular burden of proof on mothers wishing to convey citizenship to their children. By contrast, §1409(a)(1), which petitioners do not challenge before this Court, requires that "a blood relationship between the person and the father [be] established by clear and convincing evidence." The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of §1409(a)(1).

If rational basis scrutiny were appropriate in this case, then the claim that "[t]he Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity[]" would have much greater force. But fidelity to the Constitution's pledge of equal protection demands more when a facially sex-based classification is at issue. This is not because we sit in judgment of the wisdom of laws in one instance but not the other, but rather because of the potential for "injury . . . to personal dignity" that inheres in or accompanies so many sex-based classifications.

B

The Court states that "[t]he second important governmental interest furthered in a substantial manner by §1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." The Court again fails to demonstrate that this was Congress' actual purpose in enacting §1409(a)(4). The majority's focus on "some demonstrated opportunity or potential to develop . . . real, everyday ties," in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny.

Assuming, as the majority does, that Congress was actually concerned about ensuring a "demonstrated opportunity" for a relationship, it is questionable whether such an opportunity qualifies as an "important" governmental interest apart from the existence of an actual relationship. By focusing on "opportunity" rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie. Children who have an "opportunity" for such a tie with a parent, of course, may never develop an actual relationship with that parent. If a child grows up in a foreign country without any postbirth contact with the citizen parent,

then the child's never-realized "opportunity" for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose.

Under the present law, the statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the "opportunity" for a relationship. The mother can transmit her citizenship at birth, but the father cannot do so in the absence of at least one other affirmative act. The different statutory treatment is solely on account of the sex of the similarly situated individuals. This type of treatment is patently inconsistent with the promise of equal protection of the laws.

Indeed, the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The "[p]hysical differences between men and women[]" therefore do not justify §1409(a)(4)'s discrimination.

No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.

In Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), the Court declared unconstitutional a 55-year-old exception that made it easier for children who are born overseas to an unmarried mother who is a U.S. citizen to acquire citizenship than those whose unmarried father is the U.S. citizen.

When Morales-Santana was born in the Dominican Republic in 1962, he would have been a U.S. citizen if his mother had been a U.S. citizen and had spent at least one year in the United States. But because his parents were not married and his father was the U.S. citizen, Morales-Santana was entitled to U.S. citizenship only if his father had lived in the United States for at least 10 years before his birth, with five of those years coming after the age of 14. But his father had moved from Puerto Rico to the Dominican Republic only 20 days before his 19th birthday. (In 1986, Congress amended the law, so that unmarried U.S.-citizen fathers need only to have lived in the United States for five years before their children are born, but it continues to apply different standards for men and women.)

The Court said that the more favorable treatment for unmarried U.S.-citizen mothers rested on "overbroad generalizations," which perpetuate stereotypes that require women "to continue to assume the role of primary family caregiver" while at the same time working against men who do "exercise responsibility for raising their children." The Court said that laws which treat men and women differently can survive a constitutional challenge only if the government can show both that the distinction serves an important purpose and that there is a close fit between the purpose and the method chosen to achieve it. The Court said that the government failed to meet this test.

In terms of remedy, the Court said that extending the shorter residency requirements for unmarried mothers to unmarried fathers would put children of a married U.S.-citizen parent at a disadvantage, which could not have been what Congress had intended. Instead, the court ruled, the longer residency requirement should apply to everyone, including (going forward) the children of unmarried U.S.-citizen mothers — at least until Congress can step in and "settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender."

E. DISCRIMINATION AGAINST NON-UNITED STATES CITIZENS

This type of discrimination—sometimes referred to as "alienage classifications"—should be distinguished from national origin classifications that discriminate against individuals because of the country that a person, or his or her ancestors, came from.

Although America is very much a nation of immigrants, discrimination against aliens long has been widespread. Whether it is founded on economic protectionism, or xenophobia, or other motivations, aliens frequently have been denied benefits and privileges accorded to citizens. The issue is when such discrimination is a denial of equal protection of the laws.

Aliens are protected from discrimination because the Equal Protection Clause explicitly says that no "person" shall be denied equal protection of the laws. The clause does not mention the word "citizen," although it is used in the Privileges or Immunities Clause, which also is found in §1 of the Fourteenth Amendment. Long ago, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the U.S. Supreme Court declared, "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] 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."[120]

Often state and local laws that discriminate against aliens can be challenged on preemption grounds as well as for violating equal protection. The Supreme Court has held that federal immigration laws wholly occupy the field and preempt state efforts to regulate immigration.[121] For example, in Toll v. Moreno, 458 U.S. 1 (1982), the Supreme Court used preemption analysis to invalidate a state law denying resident aliens in-state tuition at the University of Maryland.

Sometimes state and local laws can be challenged both based on equal protection and on preemption analysis. In Graham v. Richardson, 403 U.S. 365 (1971), presented below, the Supreme Court declared unconstitutional a state law denying welfare benefits to aliens. The Court found both that it violated equal protection and that it was preempted by federal control over the field of immigration law.

As described below in subsection 1, the general rule is that strict scrutiny is used to evaluate discrimination against noncitizens. There are, however, several exceptions where less than strict scrutiny is used. Subsection 2 describes the case law establishing that alienage classifications related to self-government and the democratic process need only meet rational basis review. Subsection 3 discusses the use of rational basis review for federal laws that discriminate against aliens. The Supreme Court has recognized that Congress has plenary power to regulate immigration and thus has been deferential to federal statutes and presidential orders that discriminate against aliens. Finally, subsection 4 discusses the protection for undocumented aliens under equal protection.

1. Strict Scrutiny as the General Rule

The Supreme Court has held that generally alienage classifications must meet strict scrutiny.

GRAHAM v. RICHARDSON

403 U.S. 365 (1971)

Justice BLACKMUN delivered the opinion of the Court.

These are welfare cases. The issue here is whether the Equal Protection Clause of the Fourteenth Amendment prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years. The facts are not in dispute.

This case, from Arizona, concerns the State's participation in federal categorical assistance programs. They are supported in part by federal grants-in-aid and are administered by the States under federal guidelines. Arizona Rev. Stat. Ann. §46233 reads: "A. No person shall be entitled to general assistance who does not meet and maintain the following requirements: 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years. . . ."

Appellee Carmen Richardson, at the institution of this suit in July 1969, was 64 years of age. She is a lawfully admitted resident alien. She emigrated from Mexico in 1956 and since then has resided continuously in Arizona. She became permanently and totally disabled. She also met all other requirements for eligibility for APTD benefits except the 15-year residency specified for aliens. She applied for benefits but was denied relief solely because of the residency provision.

The appellants argue initially that the States, consistent with the Equal Protection Clause, may favor United States citizens over aliens in the distribution of welfare

benefits. It is said that this distinction involves no "invidious discrimination" for the State is not discriminating with respect to race or nationality.

The Fourteenth Amendment provides, "[N]or 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." It has long been settled, and it is not disputed here, that the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.

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Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. This is so in "the area of economics and social welfare." But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see United States v. Carolene Products Co., n.4 (1938)) for whom such heightened judicial solicitude is appropriate.

Arizona seek[s] to justify [its] restrictions on the eligibility of aliens for public assistance solely on the basis of a State's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. It is true that this Court on occasion has upheld state statutes that treat citizens and noncitizens differently, the ground for distinction having been that such laws were necessary to protect special interests of the State or its citizens. [W]e conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify restricting benefits to citizens and longtime resident aliens.

[A]s the Court recognized in *Shapiro* [in declaring unconstitutional durational residency requirements for welfare]: "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." Since an alien as well as a citizen is a "person" for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.

Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause.

The Court applied *Graham* in two cases decided in 1973: Sugarman v. Dougall, 413 U.S. 634 (1973), and In re Griffiths, 413 U.S. 717 (1973). In *Sugarman*, the Supreme Court declared unconstitutional a New York law that prevented aliens from holding civil service jobs. The Court said that excluding aliens denied equal protection and that a "flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment."

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In re Griffiths invalidated as violating equal protection a state law that excluded aliens from being licensed as attorneys. The Court reaffirmed that strict scrutiny was the appropriate test for discrimination against aliens and held that it was impermissible for states to require citizenship as a condition for practicing law.

The Court applied these decisions in later cases. In Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the Supreme Court declared unconstitutional a Puerto Rico statute that permitted only United States citizens to engage in the private practice of engineering. The Court said that the earlier decisions "establish that state classifications based on alienage are subject to strict judicial scrutiny." The Court said that excluding aliens from private practice as engineers has no "rational relationship to skill, competence, or financial responsibility."

Likewise, in Nyquist v. Mauclet, 432 U.S. 1 (1977), the Supreme Court used strict scrutiny to invalidate a New York law that limited financial aid for higher education to citizens, those who had applied for citizenship, and those who declared an intent to apply as soon as they were eligible. The Court emphasized the discriminatory nature of the statute, observing that the law "is directed at aliens and . . . only aliens are harmed by it."

2. Alienage Classifications Related to Self-Government and the Democratic Process

Although strict scrutiny is the general rule when the government discriminates against aliens, the Supreme Court has carved an important exception: Only rational basis review is used for alienage classifications related to self-government and the democratic process. The Supreme Court has said that "a democratic society is ruled by its people."[122] Hence, the Court has declared that a state may deny aliens the right to vote or hold political office[123] or serve on juries.[124]

Rather than use strict scrutiny and find these interests to be compelling, the Court has altered the level of scrutiny when the alienage classification relates to self-government and the democratic process.

FOLEY v. CONNELIE

435 U.S. 291 (1978)

Chief Justice BURGER delivered the opinion of the Court.

We noted probable jurisdiction in this case to consider whether a State may constitutionally limit the appointment of members of its police force to citizens of the United States. The appellant, Edmund Foley, is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident. He applied for appointment as a New York State trooper, a position which is filled on the basis of competitive examinations. Pursuant to a New York statute, state authorities refused to allow Foley to take the examination. The statute provides: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States."

Appellant claims that the relevant New York statute violates his rights under the Equal Protection Clause. The decisions of this Court with regard to the rights of aliens living in our society have reflected fine, and often difficult, questions of values. As a Nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as "a nation of immigrants." Indeed, aliens lawfully residing in this society have many rights which are accorded to noncitizens by few other countries. Our cases generally reflect a close scrutiny of restraints imposed by States on aliens.

But we have never suggested that such legislation is inherently invalid, nor have we held that all limitations on aliens are suspect.

It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of "strict scrutiny," because to do so would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship." The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decision-making. Accordingly, we have recognized "a State's historical power to exclude aliens from participation in its democratic political institutions," part of the sovereign's obligation "'to preserve the basic conception of a political community.'"

The practical consequence of this theory is that "our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives." The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification. This is not intended to denigrate the valuable contribution of aliens who benefit from our traditional hospitality. It is no more than recognition of the fact that a democratic society is ruled by its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service. Likewise, we have recognized that citizenship may be a relevant qualification for fulfilling those "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy." This is not because our society seeks to reserve the better jobs to its members. Rather, it is because this country entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator. In sum, then, it represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.

A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly

and often in the most sensitive areas of daily life. Our Constitution, of course, provides safeguards to persons, homes and possessions, as well as guidance to police officers. And few countries, if any, provide more protection to individuals by limitations on the power and discretion of the police. Nonetheless, police may, in the exercise of their discretion, invade the privacy of an individual in public places. They may under some conditions break down a door to enter a dwelling or other building in the execution of a warrant, or without a formal warrant in very limited circumstances; they may stop vehicles traveling on public highways.

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. In short, it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens. It is not surprising, therefore, that most States expressly confine the employment of police officers to citizens, whom the State may reasonably presume to be more familiar with and sympathetic to American traditions. In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States.

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

Today the Court upholds a law excluding aliens from public employment as state troopers. I do not agree with the Court that state troopers perform functions placing them within this "narro[w] . . . exception," to our usual rule that discrimination against aliens is presumptively unconstitutional. Accordingly I dissent.

In one sense, of course, it is true that state troopers participate in the execution of public policy. Just as firefighters execute the public policy that fires should be extinguished, and sanitation workers execute the public policy that streets should be kept clean, state troopers execute the public policy that persons believed to have committed crimes should be arrested. But this fact simply demonstrates that the exception, if read without regard to its context, "would swallow the rule."

Thus the phrase "execution of broad public policy" cannot be read to mean simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature. The head of an executive agency for example, charged with promulgating complex regulations under a statute, executes broad public policy in a sense that file clerks in the agency clearly do not. In short, those "elective or important nonelective" positions that involve broad policymaking responsibilities are the only state jobs from which aliens as a group may constitutionally be excluded. In my view, the job of state trooper is not one of those positions.

No one suggests that aliens as a class lack the intelligence or the courage to serve the public as police officers. The disqualifying characteristic is apparently a foreign allegiance which raises a doubt concerning trustworthiness and loyalty so pervasive that

a flat ban against the employment of any alien in any law enforcement position is thought to be justified. But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? Are untrustworthy or disloyal lawyers more tolerable than untrustworthy or disloyal policemen? Or is the legal profession better able to detect such characteristics on an individual basis than is the police department? Unless the Court repudiates its holding in *In re Griffiths* it must reject any conclusive presumption that aliens, as a class, are disloyal or untrustworthy.

Even if the Court rejects this analysis, it should not uphold a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the discrimination. If the unarticulated characteristic is concern about possible disloyalty, it must equally disqualify aliens from the practice of law; yet the Court does not question the continuing vitality of its decision in *Griffiths*. Or if that characteristic is the fact that aliens do not participate in our democratic decisionmaking process, it is irrelevant to eligibility for this category of public service. If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court.

AMBACH v. NORWICK

441 U.S. 68 (1979)

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization. New York Education Law §3001(3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975. Both applications were denied because of appellees' failure to meet the requirements of §3001(3).

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with

the polity which, in a democratic republic, exercises the powers of governance. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government."

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects. More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.

Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest.

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether §3001(3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship. Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and §3001(3) furthers that judgment.

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

Once again the Court is asked to rule upon the constitutionality of one of New York's many statutes that impose a requirement of citizenship upon a person before that person may earn his living in a specified occupation. These New York statutes, for the most part, have their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day. We are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels. It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident "aliens" in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in anyway, other than the imposed requirement of citizenship, to teach. Both appellee Norwick and appellee Dachinger have been in this country for over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York. Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay.

[T]he New York classification is irrational. Is it better to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently. That is the way to accomplish the desired result. An artificial citizenship bar is not a rational way. It is, instead, a stultifying provision. The route to "diverse and conflicting elements" and their being "brought together on a broad but common ground," which the Court so emphasizes, is hardly to be achieved by disregarding some of the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide.

In Cabell v. Chavez-Salido, 454 U.S. 432 (1982), the Supreme Court followed *Foley* and *Ambach* and held that a state may require citizenship for a person to be a probation officer. The Court said that probation officers serve both as law enforcement officers and also as teachers in the sense that they perform an educational function for those they supervise. The Court therefore used only the rational basis test and upheld the law.

But in Bernal v. Fainter, 467 U.S. 216 (1984), the Supreme Court refused to apply this exception to a state law that created a citizenship requirement for a person to be a notary public. The Court reaffirmed that "[a]s a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny." The Court emphasized that this is a "narrow" exception that applies only if it is specifically tailored to those who "participate directly in the formulation, execution, or review of broad public policy, and hence perform functions that go to the heart of representative government." The Court said that notary publics do not perform responsibilities that go to the heart of representative government. Therefore, strict scrutiny was applied and the state law was deemed to violate equal protection.

3. Congressionally Approved Discrimination

Another exception to the usual rule of strict scrutiny for alienage classifications is where the discrimination is a result of a federal law. The Supreme Court has ruled that the federal government's plenary power to control immigration requires judicial deference and that therefore only rational basis review is used if Congress has created the alienage classification or if it is the result of a presidential order.

In Mathews v. Diaz, 426 U.S. 67 (1976), the Supreme Court unanimously upheld a federal statute that denied Medicaid benefits to aliens unless they have been admitted for permanent residence and have resided for at least five years in the United States. The Court said that "the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."

The Court thus drew a distinction between alienage classifications imposed by the federal government and those created by state and local governments. Strict scrutiny is used for the latter, but the Court said that the federal law was upheld because it was not "wholly irrational" and served the "legitimate" interests of the federal government in preserving the fiscal integrity of the program.

However, in Hamptom v. Wong, 426 U.S. 88 (1976), the Supreme Court clarified this and articulated a distinction between decisions by Congress or the president and those by federal administrative agencies; rational basis review is used only for the former. The Court invalidated a federal civil service regulation that denied employment to aliens. The Court said that "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." The Court therefore explained that if the civil service regulation had been adopted via a federal law or a presidential order, "it would be

justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes."

But the Civil Service Commission that adopted the regulation had no involvement in making decisions concerning immigration or foreign policy. Nor was there anything to "indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value . . . of enlarging the pool of eligible employees on the other." The Civil Service regulation was invalidated even though it would have been constitutional if adopted by other federal government institutions.

4. Undocumented Aliens and Equal Protection

Plyler v. Doe is the major Supreme Court decision concerning equal protection for undocumented aliens.

PLYLER v. DOE

457 U.S. 202 (1982)

Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

[I]

The Fourteenth Amendment provides that "[n]o State shall . . . 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." Appellants argue at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. Although the congressional debate concerning §1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population.

[II]

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But §21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of §21.031.

Public education is not a "right" granted to individuals by the Constitution. San Antonio Independent School Dist. v. Rodriguez (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance."

We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have

been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

B

These well-settled principles allow us to determine the proper level of deference to be afforded §21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. But more is involved in these cases than the abstract question whether §21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of §21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in §21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

[III]

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that while other aliens are admitted "on an equality of legal privileges with all citizens under non-discriminatory laws," the asserted right of these children to an education can claim no implicit congressional imprimatur. Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of

undocumented status, provides authority for its decision to impose upon them special disabilities.

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "the purposes for which the state desires to use it."

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents." Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. Graham v. Richardson (1971).

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, §21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.

Second, while it is apparent that a State may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. As the District Court noted, the State failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child [that might result from devoting some state funds to the education of the excluded group] will have a grave

impact on the quality of education." And, after reviewing the State's school financing mechanism, the District Court concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.

Chief Justice BURGER, with whom Justice WHITE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of "remedies" for the failures—or simply the laggard pace—of the political processes of our system of government. The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others.

The dispositive issue in these cases, simply put, is whether, for purpose of allocating its finite resources, a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there. The distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional.

The Court acknowledges that, except in those cases when state classifications disadvantage a "suspect class" or impinge upon a "fundamental right," the Equal Protection Clause permits a state "substantial latitude" in distinguishing between different groups of persons. Moreover, the Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class, or that education is a fundamental right. Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.

In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education. If ever a court was guilty of an unabashedly result- oriented approach, this case is a prime example.

Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose.

The State contends primarily that §21.031 serves to prevent undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school-financing system against an ever-increasing flood of illegal aliens—aliens over whose entry or continued presence it has no control. Of course such fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons. Yet I assume no Member of this Court would argue that prudent conservation of finite state revenues is per se an illegitimate goal. Indeed, the numerous classifications this Court has sustained in social welfare legislation were invariably related to the limited amount of revenues available to spend on any given program or set of programs.

Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.

F. DISCRIMINATION AGAINST NONMARITAL CHILDREN

It is now clearly established that intermediate scrutiny is applied in evaluating laws that discriminate against nonmarital children—that is, children whose parents were not married. In Clark v. Jeter, 486 U.S. 456 (1988), the Supreme Court declared unconstitutional a state law that required a nonmarital child to establish paternity within six years of birth in order to seek support from his or her father. The Court expressly stated that intermediate scrutiny is used for discriminatory classifications based on illegitimacy. The Court felt that the six-year limitations period was impermissible because financial needs may not emerge until later and because it did not offer the child a sufficient opportunity to present his or her own claims.

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Intermediate scrutiny is justified because of the unfairness of penalizing children because their parents were not married. The Supreme Court observed, "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is ineffectual—as well as an unjust—way of deterring the parent."[125]

As with other classifications that receive heightened scrutiny, there is a long history of discrimination and it is immutable in the sense that there is nothing the individual can do to change his or her status.[126] As the Supreme Court noted, "[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."[127]

But the Court also has distinguished discrimination against nonmarital children from the types of classifications that receive strict scrutiny. Illegitimacy is different from race, which receives strict scrutiny, or gender, which receives intermediate scrutiny, in that "illegitimacy does not carry an obvious badge."[128] Additionally, the "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[129]

In applying intermediate scrutiny in this area, two major principles emerge from the Court's decisions. First, laws that provide a benefit to all marital children, but no nonmarital children, always are declared unconstitutional. Second, laws that provide a benefit to some nonmarital children, while denying the benefit to other nonmarital children, are evaluated on a case-by-case basis under intermediate scrutiny.

LAWS DENYING BENEFITS TO ALL NONMARITAL CHILDREN

The Supreme Court consistently has invalidated laws that deny a benefit to all nonmarital children that is accorded to all marital children. In Levy v. Louisiana, 391 U.S. 68 (1968), the Supreme Court declared unconstitutional a state law that prevented nonmarital children from suing under a wrongful death statute for losses because of a mother's death. All marital children could sue but no nonmarital children. The Court found this unreasonable: "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . [I]t is invidious to discriminate against

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[the children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."

In a companion case, Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968), the Supreme Court declared unconstitutional a state law that prevented parents from suing for the wrongful death of their nonmarital children. The Court concluded that "[w]here the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock."

Similarly, in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973), the Supreme Court ruled unconstitutional a state law that discriminated against non-marital children in receiving public assistance. A New Jersey law limited receipt of benefits under the "Assistance to Families of the Working Poor" program to families where there were two married adults and a child. The Supreme Court said that allowing all marital children to receive these benefits, but no nonmarital children, violated equal protection.

In the same year that *Cahill* was decided, the Supreme Court also declared unconstitutional a Texas law that created a legal obligation for fathers to support their marital children but no similar duty with regard to nonmarital children. In Gomez v. Perez, 409 U.S. 535, 538 (1973), in concluding that the law violated equal protection, the Court stated, "[A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

In Trimble v. Gordon, 430 U.S. 762 (1977), the Supreme Court deemed unconstitutional a law that prevented nonmarital children from inheriting from fathers who died intestate (without a will). An Illinois law allowed marital children to inherit from either parent, but a nonmarital child only could inherit from his or her mother. Although the Court recognized the need to establish paternity for unwed fathers, it concluded that this did not justify the complete denial of benefits to all nonmarital children whose fathers died intestate.

In all of these cases, the laws in question allowed all marital children to receive a benefit that was denied to all nonmarital children. In each instance, the Supreme Court found that the discrimination violated equal protection.

LAWS THAT PROVIDE A BENEFIT TO SOME NONMARITAL CHILDREN

No similar bright-line rule exists when the law provides a benefit to some nonmarital children that it denies to other nonmarital children. In other words, rather than discriminating between marital and nonmarital children, these laws distinguish among nonmarital children. Such statutes are subjected to intermediate scrutiny and evaluated on a case-by-case basis with the courts determining whether there is an important interest served and whether the law is substantially related to that goal.

In Lalli v. Lalli, 439 U.S. 259 (1978), the Supreme Court upheld a state law that provided that a nonmarital child could inherit from his or her father only if paternity was established during the father's lifetime. In other words, some nonmarital children could inherit—those where paternity was established during the father's life, other nonmarital children could not inherit—where paternity was not so established. The Court said that the state had an important interest in preventing fraud and that requiring paternity to be established during the father's lifetime was substantially related to that objective.

In Labine v. Vincent, 401 U.S. 532 (1971), the Supreme Court upheld a state law that denied inheritance from a nonmarital father unless the child had been formally acknowledged by the father during the father's life. Although the Court does not expressly say so, it appears that in *Labine*, like in *Lalli*, the Court accepted the state's argument that requiring paternity to be established in this way is substantially related to the government's interest in preventing fraud.

Another case upholding a distinction among nonmarital children was Mathews v. Lucas, 427 U.S. 495 (1976). The Supreme Court sustained a provision of the Social Security Act that allowed children to receive survivors' benefits only if they could establish both paternity and that the father was providing financial support. The law created a presumption of dependency for all marital children and all nonmarital children who were entitled to inherit under state law. The law allowed other nonmarital children to inherit only if they could prove financial dependency on their fathers. The Court found that the distinction among nonmarital children was constitutional because it did not preclude any child from receiving benefits and because it allowed the government to reduce its administrative burdens. Requiring every child to prove dependency would have been a substantial additional burden on the government; allowing all children to inherit without having to prove dependency would have been a greater cost on the government that it was not constitutionally required to absorb.

However, not all laws discriminating among nonmarital children have been upheld. In Jiminez v. Weinberger, 417 U.S. 628 (1974), the Supreme Court invalidated a provision of the Social Security Act that allowed intestate inheritance of disability benefits by all marital children and by nonmarital children who had been "legitimated." Other nonmarital children could inherit benefits only if they proved that they were living with or being supported by the father at the time the disability began. In other words, nonmarital children who were neither living with the father nor being supported by him when the disability arose could not get benefits.

The Supreme Court said that this was unconstitutional and explained, "Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses."

In other words, if the law's distinction is between marital and nonmarital children, the law is likely to be invalidated. But if the distinction is among nonmarital children, the Court will apply intermediate scrutiny in evaluating the law.

G. OTHER TYPES OF DISCRIMINATION:ONLY RATIONAL BASIS REVIEW

There is an infinite variety of ways that governments draw distinctions among people. For instance, laws that determine who can practice law, who can have a driver's license, who can receive welfare, who can be a police officer, and who can have a broadcast license all involve classifications. Any of these laws can be challenged as denying equal protection. Each, of course, would be subjected only to rational basis review, unless the discrimination was with regard to race, national origin, gender, alienage, or legitimacy. Thus far, these are the only types of discrimination for which the Supreme Court has approved either intermediate or strict scrutiny.[130]

The Supreme Court has expressly rejected heightened scrutiny for some other types of discrimination. Specifically, the Court has ruled that only rational basis review should be used for discrimination based on age, disability, wealth, and sexual orientation, even though these classifications share much in common with the types of discrimination for which heightened scrutiny is used.

1. Age Classifications

Many of the factors that justify heightened scrutiny for race, national origin, gender, alienage, and legitimacy classifications also exist with regard to age discrimination. There is a history of discrimination against the elderly with judgments often based on stereotypes. A person's age is immutable in the sense that a person cannot voluntarily change it and it is a characteristic that is visible. Yet the Supreme Court has expressly declared that only rational basis review should be used under equal protection analysis for age discrimination.

MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA

427 U.S. 307 (1976)

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann., that a uniformed state police officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.

Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. Appellee brought this civil action in the United States District Court for the District of Massachusetts, alleging that the operation of [the law] denied him equal protection of the laws.

The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural

disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must pass annually a more rigorous examination, including an electrocardiogram and tests for gastro-intestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.

We need state only briefly our reasons for [concluding] that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. San Antonio School District v. Rodriguez (1973) reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.

This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis.

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a "discrete and insular" group, United States v. Carolene Products Co. (1938), in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.

We turn then to examine this state classification under the rational-basis standard. In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. There is no indication that §26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of

elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. But "[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be revised." We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.

Justice MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be involuntarily "retired" because they have reached the age of 50. Although we have called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," Truax v. Raich (1915), the Court finds that the right to work is not a fundamental right. And, while agreeing that "the treatment of the aged in this Nation has not been wholly free of discrimination," the Court holds that the elderly are not a suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be "wholly unrelated" to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person, and these consequences of termination for age are not disputed by appellants. Thus, an older person deprived of his job by the government loses not only his right to earn a living, but, too often, his health as well, in sad contradiction of Browning's promise: "The best is yet to be, The last of life, for which the first was made."

Not only are the elderly denied important benefits when they are terminated on the basis of age, but the classification of older workers is itself one that merits judicial attention. Whether older workers constitute a "suspect" class or not, it cannot be disputed that they constitute a class subject to repeated and arbitrary discrimination in employment.

Turning, then, to appellants' arguments, I agree that the purpose of the mandatory retirement law is legitimate, and indeed compelling[;] the Commonwealth has every reason to assure that its state police officers are of sufficient physical strength and health to perform their jobs. In my view, however, the means chosen, the forced retirement of officers at age 50, is so over-inclusive that it must fall.

[T]he Commonwealth is in the position of already individually testing its police officers for physical fitness, conceding that such testing is adequate to determine the physical ability

of an officer to continue on the job, and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.

In Vance v. Bradley, 440 U.S. 93 (1979), the Supreme Court upheld a federal law that mandated retirement at age 60 for participants in the Foreign Service Retirement System. The statutory scheme drew a distinction between those covered by the Social Security system, where there was not a mandatory retirement age, and the Foreign Service Retirement System, which required retirement at age 60. The Court used the rational basis test and said that it upheld the law because the challengers failed "to demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability." The Court said that the federal government had a legitimate interest in having a vigorous foreign service and that a mandatory retirement age was rationally related to that end.

2. Discrimination Based on Disability

The Supreme Court also has ruled that only rational basis review should be used for discrimination based on disability. City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), presented in section B, is the leading case. In *Cleburne*, the Supreme Court used the rational basis test to declare unconstitutional a city ordinance that required a special permit for the operation of a group home for the mentally disabled. The Court declared that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."

The Supreme Court has reaffirmed that only rational basis review is to be used for discrimination based on disability. In Heller v. Doe, 509 U.S. 312 (1993), the Supreme Court upheld a state law that allowed mentally retarded individuals to be civilly committed if there was clear and convincing evidence justifying institutionalization but required that there be proof beyond a reasonable doubt before an individual could be committed because of mental illness. In a five-to-four decision, the Supreme Court applied rational basis review and concluded that there were reasonable distinctions between the mentally retarded and the mentally ill.

The Court said that the state's law was constitutional because mental retardation is subject to more objective measures than mental illness. Also, the Court said that the "prevailing methods of treatment for [the] mentally retarded, as a general rule, are much less invasive than are those given the mentally ill."

Justice Blackmun dissented and argued for heightened scrutiny for laws that "discriminate against individuals with mental retardation." Justice Souter, joined by Justices O'Connor, Blackmun, and Stevens, contended that the law failed rational basis review. Souter said that proving intellectual disability is not always easier than proving mental illness and that institutionalization and treatment of the intellectually disabled also involves a substantial loss of freedom.

Although disability classifications receive only rational basis review under the Equal Protection Clause,[131] a federal statute broadly prohibits such discrimination: the Americans with Disabilities Act.[132]

3. Wealth Discrimination

For a time it appeared that the Court would use heightened scrutiny for laws discriminating against the poor. In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court held that it violated equal protection to deny free trial transcripts to indigent criminal defendants who were appealing their conviction. The Court said that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Likewise, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the Supreme Court declared unconstitutional a poll tax for state and local elections and said that "[l]ines drawn on the basis of wealth and property, like those of race, are traditionally disfavored."

Subsequently, however, the Supreme Court clearly held that only rational basis review should be used for wealth classifications. In Dandridge v. Williams, 397 U.S. 471 (1970), the Supreme Court upheld a state law that put a cap on welfare benefits to families regardless of their size. Children in larger families therefore received less per person than those in smaller families. The Supreme Court said that rational basis review was appropriate because the law related to "economics and social welfare." The Court thus accepted the state's interest in allocating scarce public benefits as sufficient to justify the law. The Court said that "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), presented in Chapter 8, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review. *Rodriguez* involved a challenge to Texas's system of relying heavily on local property taxes to pay for public education. The result was that poor areas taxed at high rates but still had little to spend on education. Wealthy areas could tax at low rates and had a great deal to spend on schooling. The plaintiffs argued, in part, that the disparity in funding discriminated against the poor in violation of the Equal Protection Clause.

The Supreme Court, in a five-to-four decision, held that discrimination against the poor does not warrant heightened scrutiny. The Court also rejected the claim that the law should be regarded as discriminating against the poor as a group. Justice Powell, writing for the Court, stated, "[A] cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the 'poor,' appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent. . . . [T]here is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts. Second, . . . lack of personal resources has not occasioned an absolute deprivation of the desired benefit."

A few years later, in Maher v. Roe, 432 U.S. 464 (1977), also presented in Chapter 8, the Supreme Court rejected an argument that the government violated equal protection when it refused to fund abortions, even though it was paying for childbirth and other medical care costs. The Court said that it "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."

On the one hand, the Court's refusal to find that poverty is a suspect classification can be justified by distinguishing that characteristic from those where heightened scrutiny is used. Poverty is not immutable, and most discrimination against the poor is a result of the effects of the law, rather than a product of intentional discrimination. Additionally, the Court clearly wanted to avoid creating a constitutional right to government benefits such as welfare, food, shelter, or medical care.

But the poor as a group do share many characteristics with groups that are protected by intermediate and strict scrutiny. The poor lack political power, especially in a political system where money is crucial for influence. Additionally, there is a long history of discrimination against the poor in many areas. Moreover, some prominent scholars have argued that there should be a right to minimum entitlements under the Constitution; every person should be assured of food, shelter, and medical care to survive.[133]

4. Discrimination Based on Sexual Orientation

In Romer v. Evans, 517 U.S. 620 (1996), presented in section B, the Supreme Court used the rational basis test to invalidate a Colorado initiative that encouraged discrimination based on sexual orientation. Colorado's Amendment 2 repealed all state and local laws that prohibited discrimination against gays, lesbians, and bisexuals. The popularly approved initiative also prevented future laws to protect these individuals. The Supreme Court found that Amendment 2 impermissibly discriminated based on sexual orientation. Justice Kennedy, writing for the Court, said, "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."

The Court said that the initiative failed even rational basis review. Justice Kennedy explained that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation." The Court concluded that there was no legitimate purpose for denying gays, lesbians, and bisexuals the same use of the political process available to everyone else. Justice Kennedy observed that the only apparent purpose behind the law was "animosity toward the class of persons affected" and this fails even the rational basis test.

Romer v. Evans is significant because it is the first time the Court invalidated discrimination based on sexual orientation. Although the Court used just rational basis review, the decision indicates judicial willingness to protect gays, lesbians, and bisexuals from discrimination. *Romer* establishes that animus against gays and lesbians, even when presented as a purported "moral" basis for a law, is not sufficient to meet the rational basis test. Because *Romer* found the Colorado law unconstitutional under

rational basis review, the Court had no need to consider whether heightened scrutiny is appropriate for discrimination based on sexual orientation.

In Lawrence v. Texas (2003), presented in the next chapter, the Court, relying on due process, struck down a state law prohibiting private consensual homosexual activity. The Court did not specify the level of scrutiny it was using.

In United States v. Windsor (2013), also presented in the next chapter, the Court invalidated a provision of the federal Defense of Marriage Act that said that for purposes of federal law and federal benefits marriage had to be between a man and a woman. The Court, in a 5-4 decision, concluded that this denied equal protection to gays and lesbians. The Court again did not indicate the level of scrutiny being applied. In Obergefell v. Hodges (2015), also in the next chapter, the Court, again by a 5-4 margin, struck down state laws prohibiting same-sex marriage as violating the right to marry and denying equal protection to gays and lesbians. Yet again, the Court did not specify the level of scrutiny being used.

Notes

1 Buck v. Bell, 274 U.S. 200, 208 (1927).

2 Buckley v. Valeo, 424 U.S. 1, 93 (1976).

3 *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (invalidating state law limiting jury service to "white male persons").

4 *See*, *e.g.*, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (discriminatory impact is insufficient to prove a gender classification; there must be proof of discriminatory purpose); Washington v. Davis, 426 U.S. 229 (1976) (discriminatory impact is insufficient to prove a racial classification; there must be proof of discriminatory purpose).

5 Professor Gerald Gunther described it as "strict in theory and fatal in fact." *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

6 *See*, *e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Lehr v. Robertson, 463 U.S. 248, 266 (1983).

7 *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

8 *See*, *e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 175, 177 (1980); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959).

9 *See*, *e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Zobel v. Williams, 457 U.S. 55 (1982); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (all discussed below).

10 *See*, *e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1980); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

11 *See*, *e.g.*, Graham v. Richardson, 403 U.S. 365, 367 (1971).

12 *See* Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin, [t]hese 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. . . . 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.").

13 *See*, *e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109, 110 (1973) (Marshall, J., dissenting).

14 *See* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161 (1984).

15 These concepts were articulated and explained in Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 348-353 (1949).

16 *See* Korematsu v. United States, 323 U.S. 214 (1944), presented below.

17 *See* Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 Colum. L. Rev. 175 (1945).

18 Although equal protection is usually thought of in terms of people suffering discrimination because of group characteristics, a person can bring an equal protection claim bases on a "class of one theory"—that he or she is singled out for different treatment than others similarly situated. Village of Willowbrook v. Olech, 528 U.S. 562 (2000). However, in Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), the Supreme Court ruled that government employees cannot bring class of one claims.

19 *Skinner* is presented more fully in Chapter 8 in the discussion of the right to procreate.

20 *See*, *e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

21 *See*, *e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (right to fee waiver for indigents in filing for divorce); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal for indigents); Griffin v. Illinois, 351 U.S. 12 (1956) (right to free transcripts on appeal for indigents).

22 *See*, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (declaring unconstitutional as violating the right to travel a state law creating a one-year residency requirement for receiving welfare).

23 *See*, *e.g.*, Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911); Royston Guaro Co. v. Virginia, 253 U.S. 412 (1920).

24 *See* McGowan v. Maryland, 366 U.S. 420, 425-426 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.").

25 This, of course, was the philosophy articulated in the famous *Carolene Products* footnote 4. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-153 n.4 (1938), presented in Chapter 6.

26 "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

27 *See* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161 (1984); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-24 (1972).

28 348 U.S. 26, 32 (1954).

29 McGowan v. Maryland, 366 U.S. 420, 426 (1961).

30 Kassell v. Consolidated Freightways Corp., 450 U.S. 662, 702-703 (1981) (Rehnquist, J., dissenting).

31 McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

32 Dallas v. Stanglin, 490 U.S. 19, 26 (1989).

33 Mathews v. DeCastro, 429 U.S. 181, 185 (1976), quoting Helvering v. Davis, 301 U.S. 619, 640 (1937).

34 Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

35 Laurence H. Tribe, *American Constitutional Law* 1449 (2d ed. 1988).

36 *See* Donald L. Robinson, *Slavery in the Structure of American Politics, 1765-1820*, 209-210 (1971).

37 For an excellent description of these cases and this history, *see* Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975).

38 In *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), the Supreme Court suggested that slavery was inconsistent with national law and therefore had to be authorized by statute.

39 Sanford's name is misspelled in the United States Reports as "Sandford."

40 *See* Roberts v. City of Boston, 59 Mass. (59 Cush.) 198 (1849) (upholding segregation in public education).

41 Initially, Southern states rejected the Fourteenth Amendment. These states approved the amendment only after Congress, in the Reconstruction Act, made ratification a condition for admission to the Union. By then, two Northern states rescinded their ratification. The Fourteenth Amendment was deemed ratified when three-fourths of the states—counting the Southern states that ratified under protest and the two states that had rescinded their ratification—had approved it.

42 *See*, *e.g.*, Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986); Palmore v. Sidoti, 466 U.S. 429, 432-433 (1984).

43 Wygant v. Jackson Board of Education, 476 U.S. 267, 280 n.6 (1986).

44 *See*, *e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal affirmative action programs must meet strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (state and local affirmative action programs must meet strict scrutiny).

45 The *Slaughter-House Cases*, 83 U.S. 36, 81 (1872).

46 Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

47 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), presented in Chapter 6.

48 *See*, *e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Lockhart v. McCree, 476 U.S. 162, 175 (1986).

49 William Manchester, *The Glory and the Dream* 300-301 (1974) (describing the conditions in internment camps).

50 The Court in *Loving* also based its decision on the fundamental right to marry. This portion of the opinion is presented in Chapter 8.

51 For example, the Civil Rights Act of 1866 provided that blacks and whites should have the same rights to make and enforce contracts, sue, give evidence, and acquire property. These provisions now are codified at 42 U.S.C. §§1981 and 1982. In 1871, Congress adopted the Ku Klux Klan Act, which provided criminal penalties and civil liability for any person acting under color of state law who violates the Constitution or laws of the United States or who engages in a conspiracy to violate civil rights. These provisions are now codified as 18 U.S.C. §§241 and 242 (criminal provisions), 42 U.S.C. §1983 (civil liability), and 42 U.S.C. §1985 (civil liability for conspiracies). In 1875, Congress passed a law prohibiting discrimination by places of public accommodations such as inns, theaters, and places of public amusement. This law was declared unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). This case is presented in Chapter 5.

52 This is presented in Chapter 5.

53 Daniel Farber, William N. Eskridge, Jr. & Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* 37 (1993).

54 *See* C. Vann Woodward, *The Strange Career of Jim Crow* (1957).

55 Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 257 (1977).

56 For a superb discussion of this litigation and its history, *see* Kluger, *id.*

57 Kluger, *id.*, at 327.

58 Briggs v. Elliott, decided with Brown v. Board of Education, 347 U.S. 483 (1954).

59 Kluger, *supra* note 55, at 332.

60 William O. Douglas, *The Court Years: 1939-1975*, at 113 (1980).

61 *See* Kluger, *supra* note 55, at 694-699.

62 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). [Footnote by the Court.]

63 *See*, *e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150 (1955).

64 Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 Law & Contemp. Probs. 57, 70 (Autumn 1978).

65 Herbert Wechsler criticized *Brown* for lacking a sufficient "neutral principle" to justify its conclusion. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). For excellent responses to Wechsler, *see* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

66 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

67 *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105 (1989).

68 Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 355 (1987).

69 *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935 (1989).

70 Laurence H. Tribe, *American Constitutional Law* 1516-1519 (2d ed. 1988).

71 In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a city's ordinance required that laundries be located in brick or stone buildings unless a waiver was obtained from the board of supervisors. The plaintiff alleged that over 200 petitions by those of Chinese ancestry had been denied, although all but one of the petitions filed by non-Chinese individuals were granted. The Supreme Court unanimously reversed Yick Wo's conviction for violating the ordinance and explained, "[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 the 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."

Gomillion v. Lightfoot, 364 U.S. 339 (1960), involved a challenge to the government's redrawing of the city's boundaries to exclude blacks from participating in city elections. Tuskegee, Alabama, was

transformed from a square shape into a 28-sided figure. All but 4 or 5 of the 400 blacks in the city were placed outside its boundaries, but no whites were excluded. The Court said that the "conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." [Footnote by casebook author.]

72 Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See Mt. Healthy City School Dist. Bd. of Education v. Doyle (1977). [Footnote by the Court.]

73 Batson v. Kentucky, 476 U.S. 79 (1986).

74 Georgia v. McCollum, 505 U.S. 42 (1992).

75 Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

76 The Court recently dealt with race in another aspect of the criminal justice system and specifically juries. In Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017), the Court held that a trial judge cannot ignore, and must take actions (though what must be done is unclear), when there are allegations that a juror made racist statements during jury deliberation. Chief Justice Roberts, writing for the Court, explained: "The unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."' Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"

77 Powers v. Ohio, 499 U.S. 400 (1991).

78 For a review of these laws, *see* Robert B. McKay, *"With All Deliberate Speed"—A Study of School Desegregation*, 31 N.Y.U. L. Rev. 991, 1039-1049 (1956).

79 *See* Griffin v. County School Board, 377 U.S. 218 (1964).

80 *See* Goss v. Board of Education, 373 U.S. 683 (1963).

81 *See* Rogers v. Paul, 382 U.S. 198 (1965).

82 Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 9 (1994).

83 *Id.* at 9.

84 *Id.*

85 *Id.*

86 Larry Tye, *Social Racial Gaps Found Nationwide*, Boston Globe, Jan. 9, 1992, at 3.

87 Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 2, The Civil Rights Project, Harvard Univ. (2001).

88 *Illinois Schools Most Segregated*, Chicago Sun Times, Sept. 5, 1982, at 6.

89 National Center for Education Statistics, *Characteristics of the 100 Largest Public Elementary and Secondary Schools in the United States*, *2012-13*, nces.ed.gov.

90 *See*, *e.g.*, United States v. Board of School Commrs., 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part and vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976) (approving interdistrict remedies); *see also* Hills v. Gautreaux, 425 U.S. 284 (1976) (approving an interdistrict remedy for housing discrimination).

91 411 U.S. 1 (1973), presented in Chapter 8.

92 Earlier in Missouri v. Jenkins, 495 U.S. 33 (1990), the Supreme Court ruled that a federal district court could order that a local taxing body increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes.

93 Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1048 (1979).

94 Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and United Steelworkers v. Weber*, 95 Ethics 86, 88-89 (1984).

95 John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735 (1974); *see also* Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich. L. Rev. 1729, 1774 (1989).

96 "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them. I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation. [Footnote by Justice Thomas.]

97 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. Likewise, with respect to §1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." Furthermore, we have explained that a contract for educational services is a "contract" for purposes of §1981. Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate §1981. [Footnote by the Court.]

98 The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ[e]" that would permit the College to enroll meaningful numbers of

minority students. Calling such 10 or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities. Moreover, because such plans link college admission to a single criterion—high school class rank—they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools. [Footnote by the Court.]

99 Also, in United States v. Hays, 515 U.S. 737 (1995), the Supreme Court held that only an individual who lives in the district where race allegedly was used in drawing election districts has standing to bring a challenge. This was reaffirmed in Shaw v. Hunt, 517 U.S. 899 (1996).

100 This is the point that Justice Souter emphasized in dissent in Shaw v. Reno, 509 U.S. at 681-682 (Souter, J., dissenting).

101 515 U.S. at 944-945 (Ginsburg, J., dissenting).

102 509 U.S. at 658. The Court reiterated this in Shaw v. Hunt, 517 U.S. at 905-906.

103 *See* Shaw v. Hunt, 517 U.S. at 913.

104 *Id.* at 915; Bush v. Vera, 517 U.S. at 978-979.

105 517 U.S. at 990 (O'Connor, J., concurring). This opinion is particularly unusual because Justice O'Connor also wrote the plurality opinion; in other words, she wrote both the plurality opinion and a separate concurring opinion.

106 https://www.pewsocialtrends.org/ fact-sheet/the-data-on-women-leaders/

107 Institute for Women's Policy Research, https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/

108 Reed v. Reed, 404 U.S. 71 (1971) (giving preference to men over women in administering estates), discussed below.

109 *See* Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581 (1977).

110 Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U. L.Q. 161, 162-163.

111 *See*, *e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (declaring that the purpose of the Equal Protection Clause was to limit only racial discrimination).

112 John Hart Ely, *Democracy and Distrust* 169 (1980).

113 *See*, *e.g.*, Associated Gen. Contractors of Cal. v. San Francisco, 813 F.2d 922 (9th Cir. 1987) (upholding affirmative action program for women as meeting intermediate scrutiny, but declaring unconstitutional affirmative action program based on race as failing strict scrutiny).

114 These cases are presented in Chapter 6.

115 198 U.S. 45 (1905).

116 This case is presented more fully in Chapter 6.

117 *See*, *e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Califano v. Westcott, 443 U.S. 76, 89 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-317 (1977).

118 42 U.S.C. §2000e(k).

119 There obviously also have been cases where women are discriminated against. *See, e.g.*, United States v. Virginia, 578 U.S. 515 (1996) (holding unconstitutional the exclusion of women from the Virginia Military Institute); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (declaring unconstitutional a law that allows men, but not women, to dispose of property without their spouse's consent); Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding a law excluding women from "contact positions" in all male prisons).

120 *See also* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

121 *See*, *e.g.*, DeCanas v. Bica, 424 U.S. 351 (1976); Nyquist v. Mauclet, 432 U.S. 1 (1977); preemption is discussed in Chapter 4.

122 Foley v. Connelie, 435 U.S. 291, 296 (1978).

123 Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

124 Perkins v. Smith, 426 U.S. 913 (1976).

125 Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

126 *See* Harry D. Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 498-499 (1967).

127 Mathews v. Lucas, 427 U.S. 495, 505 (1976).

128 *Id.* at 506.

129 *Id.*

130 It also is likely that heightened scrutiny will be used for discrimination based on religion. *See*, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (mentioning religion along with race and national origin as impermissible grounds for discrimination). However, such cases are likely to arise under the Free Exercise Clause of the First Amendment rather than under equal protection.

131 *See also* New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (using rational basis review for discrimination against methadone addicts), presented in section B.

132 42 U.S.C. §§12101 *et seq.*

133 *See*, *e.g.*, Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103 (1986); Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 Hastings L.J. 1 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

CHAPTER 8

Fundamental Rights Under Due Process and Equal Protection

A. INTRODUCTION

THE CONCEPT OF FUNDAMENTAL RIGHTS

The Supreme Court has held that some liberties are so important that they are deemed to be "fundamental rights" and that generally the government cannot infringe them unless strict scrutiny is met; that is, the government's action must be necessary to achieve a compelling purpose. This chapter examines many of these liberties, including rights protecting family autonomy, procreation, sexual activity and sexual orientation, medical care decision making, travel, voting, and access to the courts. This chapter concludes by examining procedural due process. Freedom of speech and religious freedom also are deemed fundamental rights and are considered in Chapters 9 and 10, respectively. Criminal procedure protections—such as the Fourth Amendment's safeguard from unreasonable searches and seizure, the Fifth Amendment's protection from self-incrimination and double jeopardy, the Sixth Amendment's assurance of a speedy trial before an impartial jury, and the Eighth Amendment's right to bail and prohibition of cruel and unusual punishment—are beyond the scope of this book.

The relatively few claims of rights listed above trigger heightened scrutiny and require the government to meet strict scrutiny. Most claims of rights under equal protection or

due process only receive minimal judicial scrutiny; that is, the government's action only has to meet the rational basis test and be shown to be rationally related to a legitimate government purpose. For example, as discussed in Chapter 6, claims of economic liberties under the Due Process Clause only receive rational basis review.

This chapter, though, examines those rights that are deemed fundamental. Of course, this chapter also will consider many examples where the Court has refused to recognize a particular right as fundamental and thus has used only rational basis review in upholding a law. The rights considered in this chapter share much in common. Almost all of these rights are not mentioned in the text of the Constitution.[1] Thus, all raise the important issue of how the Court should decide whether a liberty should be regarded as a fundamental right. Also, for almost all of these rights, the Supreme Court has indicated that strict scrutiny should be used, which means that the government must justify its interference by proving that its action is necessary to achieve a compelling government purpose.

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Almost all of these rights have been protected by the Court under the Due Process Clauses of the Fifth and Fourteenth Amendments and/or the Equal Protection Clause of the Fourteenth Amendment. Some of the rights have been protected solely under the Due Process Clause. For example, thus far, the Supreme Court has considered a constitutional right to refuse medical care as an aspect of the "liberty" protected in the Due Process Clause.[2] Other rights have so far been protected under the Equal Protection Clause. For example, the right to travel has been safeguarded under equal protection.[3] Also, the right to vote has been protected both under this clause and the Fifteenth Amendment that prohibits government racial discrimination concerning voting.[4]

Many of these rights, though, have been protected by the Court under both due process and equal protection. For example, the Court has invalidated state laws restricting access to contraceptives both as violating equal protection and as infringing the right to privacy.[5] In some cases, the justices disagree among themselves as to whether the right is protected under due process or equal protection. In Zablocki v. Redhail, 434 U.S. 374 (1978), presented below, the majority opinion found the right to marry to be a fundamental right protected under the Equal Protection Clause, but the concurring opinion used a due process approach. In United States v. Windsor, 570 U.S. 744 (2013), the Court relied solely on equal protection to strike down a key provision of the federal Defense of Marriage Act, but in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), the Court found that state laws prohibiting same-sex marriage violate the right to marry under both due process and equal protection.

Relatively little depends on whether the Court uses due process or equal protection as the basis for protecting a fundamental right. Under either provision, the Court must decide whether a claimed liberty is sufficiently important to be regarded as fundamental, even though it is not mentioned in the text of the Constitution. Also, once a right is deemed fundamental, under due process or equal protection, strict scrutiny is generally used.

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The major difference between due process and equal protection as the basis for protecting fundamental rights is in how the constitutional arguments are phrased. If a right is safeguarded under due process, the constitutional issue is whether the government's interference is justified by a sufficient purpose. But if the right is protected

under equal protection, the issue is whether the government's discrimination as to who can exercise the right is justified by a sufficient purpose. Although the difference is generally just semantics and phrasing, there can be a real distinction: If a law denies the right to everyone, then due process would be the best grounds for analysis, but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected to under due process.

THE NINTH AMENDMENT

The Ninth Amendment is often mentioned in discussions of fundamental rights, especially rights not expressly mentioned in the text of the Constitution. The Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by the people." The Supreme Court rarely has invoked the Ninth Amendment. A notable exception is Griswold v. Connecticut, 381 U.S. 479 (1965), presented below, in which Justice Goldberg, in a concurring opinion, reviewed the history of the Ninth Amendment and relied on it to justify invalidating a law prohibiting use of contraceptives.

The Ninth Amendment generally is not seen as the source of rights in that rights are not protected under it; there are no Ninth Amendment rights. Rather, the Ninth Amendment is used to provide a textual justification for the Court to protect nontextual rights, such as the right to privacy. From this perspective, the Ninth Amendment is not a repository of rights or even a provision that is itself interpreted but instead is a justification for the Court to safeguard unenumerated liberties.

PROCEDURAL DUE PROCESS

The existence of a right triggers two distinct burdens on the government. One is substantive; the government must justify an infringement by showing that its action is sufficiently related to an adequate justification. For example, when strict scrutiny is used, the substantive burden on the government is demonstrating that the law is necessary to achieve a compelling purpose. The other burden on the government is procedural. When the government takes away a person's life, liberty, or property, it must provide adequate procedures. Procedural due process is discussed in the final section of this chapter.

A simple example illustrates the concepts of substantive and procedural due process. As discussed below in section C, the Supreme Court has interpreted the word "liberty" in the Due Process Clause to mean that parents have a fundamental right to custody of their children. Substantive due process, as explained below, requires that the government show that terminating custody is necessary to achieve a compelling purpose. Procedural due process, as discussed in the final section, requires that the government provide notice and a hearing—procedures—before terminating custody.

Except for the final section on procedural due process, this chapter focuses on protection of substantive rights under due process and equal protection. In other words, the issue in all of these cases is whether the government adequately justifies its actions allegedly infringing fundamental rights.

B. FRAMEWORK FOR ANALYZING FUNDAMENTAL RIGHTS

Litigation and judicial decision making in cases about individual rights can be understood as addressing one or more of four questions. First, is there a fundamental right? Second, is the right infringed? Third, is the government's action justified by a sufficient purpose? And fourth, are the means sufficiently related to the goal sought? These four questions arise in all areas concerning rights, including economic liberties discussed in Chapter 6 and First Amendment rights discussed in Chapters 9 and 10. Because these issues arise in cases throughout this chapter, the four questions are briefly examined here before consideration of particular rights.

FIRST ISSUE: IS THERE A FUNDAMENTAL RIGHT?

If a right is deemed fundamental, the government usually will be able to prevail only if it meets strict scrutiny, but if the right is not fundamental, generally only the rational basis test is applied. This is the framework for judicial review articulated in the famous *Carolene Products* more than a half century ago: The judiciary will defer to the legislature unless there is discrimination against a "discrete and insular" minority or infringement of a fundamental right.[6]

For example, in Washington v. Glucksberg, 521 U.S. 702 (1997), discussed hereafter, the crucial question was whether there was a fundamental right to physician-assisted death. If the Court had found such a right in the liberty of the Due Process Clause for terminally ill patients, a Washington law prohibiting aiding and abetting a suicide would have been upheld only if the state had met strict scrutiny. But the Court's refusal to find such a right meant that only rational basis review was used.

The constitutional interpretation debate, discussed in more detail in Chapter 1, has been primarily about how the Court should decide what rights are fundamental and particularly whether it should find fundamental rights that are not supported by the text or the clear intent of the framers. Many different theories have been advanced to explain when the Court should or shouldn't deem rights to be fundamental.

For example, originalists take the position that fundamental rights are limited to those liberties explicitly stated in the text or clearly intended by the framers. An originalist would say that the Court acts impermissibly and usurps the democratic process if it finds other rights to be fundamental. Nonoriginalism, in contrast, is the view that it is permissible for the Court to protect fundamental rights that are not enumerated in the Constitution or intended by its drafters.

Although, as described in Chapter 1, the debate often has been characterized as a dispute between originalists and nonoriginalists, many other theories also have been advanced for identifying fundamental rights. For example, in addition to strict originalism that limits the Court to rights stated in the text or intended by the framers, there also is moderate originalism, which is the view that the judiciary should implement the framers' general intent, but not necessarily their specific views.

Alternatively, at times, the Court often has looked to history and tradition in deciding what rights not mentioned in the text are fundamental. For instance, the Supreme Court has said that fundamental rights include those liberties that are "deeply rooted in this Nation's history and tradition."[7] In addition to the difficulty of deciding what counts as a sufficient tradition for recognizing a right as fundamental, there also is the question of the abstraction at which the right is stated. At a sufficiently general level of abstraction, any liberty can be justified as consistent with the nation's traditions. At a very specific level of abstraction, few nontextual rights would be justified.

There are many other theories as well for deciding what is a fundamental right. Some argue that the Court's preeminent role is perfecting the processes of government and that the Court should only recognize nontextual rights that concern ensuring adequate representation and the effective operation of the political process.[8] Others argue that the Court should use natural law principles in deciding what rights to protect as fundamental.[9] Still other scholars maintain that the Court should recognize nontextual fundamental rights that are supported by a deeply embedded moral consensus that exists in society.[10]

These theories, and the arguments for and against them, are discussed in Chapter 1. Throughout this chapter an underlying question is whether a particular liberty should be deemed a fundamental right, and that raises the methodological question of how the Court should decide this issue. Inevitably, it provokes debate about the proper role of an unelected judiciary in a democratic society and also about what activities are so important that the courts should find a fundamental right to exist.

SECOND ISSUE: IS THE CONSTITUTIONAL RIGHT INFRINGED?

If there is a fundamental right, the next question must be: Has the government infringed the right? There, of course, is no doubt that a constitutional right is infringed and the government's action must be justified when the exercise of the right is prohibited. For example, if there is a fundamental right to purchase and use contraceptives, a law that outlaws all distribution and use of birth control obviously is an infringement. But when is burdening the exercise of a fundamental right also to be considered an infringement requiring the application of strict scrutiny?

The Supreme Court has said that in evaluating whether there is a violation of a right it considers "[t]he directness and substantiality of the interference."[11] But there has been surprisingly little discussion of what constitutes a direct and substantial interference with a right.

THIRD ISSUE: IS THERE A SUFFICIENT JUSTIFICATION FOR THE GOVERNMENT'S INFRINGEMENT OF A RIGHT?

If a right is deemed fundamental, the government must present a compelling interest to justify an infringement. Alternatively, if a right is not fundamental, only a legitimate purpose is required for the law to be sustained.

The Supreme Court never has articulated criteria for determining whether a claimed purpose is to be deemed "compelling." The most that can be said is that the government

has the burden of persuading the Court that a truly vital interest is served by the law in question. For example, the Court has recognized as "compelling" interests such as winning a war[12] and assuring that children receive adequate care.[13]

FOURTH ISSUE: IS THE MEANS SUFFICIENTLY RELATED TO THE PURPOSE?

Under strict scrutiny it is not enough for the government to prove a compelling purpose behind a law; the government also must show that the law is *necessary* to achieve the objective. This requires that the government prove that it could not attain the goal through any means less restrictive of the right. In comparison, under rational basis review, the means only has to be a reasonable way to achieve the goal and the government is not required to use the least restrictive alternative.

There is no formula for deciding whether a means is necessary or whether a less restrictive means can suffice. The government's burden when there is an infringement of a fundamental right is to prove that no other alternative, less intrusive of the right, can work.

In some cases, all four of these issues are in controversy. In other cases, the focus might be on just one or two of the questions. Inevitably, all four require that the judiciary make value choices: What is important enough to be a fundamental right; what is intrusive enough to be deemed an invasion; what is significant enough to be regarded as a compelling interest; and what is narrowly tailored enough to be regarded as a necessary means? These four questions recur throughout the cases discussed in this chapter.

C. CONSTITUTIONAL PROTECTION FOR FAMILY AUTONOMY

1. The Right to Marry

The Supreme Court first recognized the right to marry as a fundamental right protected under the liberty of the Due Process Clause in Loving v. Virginia.

LOVING v. VIRGINIA, 388 U.S. 1 (1967): Chief Justice WARREN delivered the opinion of the Court.

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

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws.

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

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

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions.

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 Supreme Court found that the Virginia law was impermissible race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. This portion of the opinion is presented in Chapter 7.]

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

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. State of Oklahoma (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.

In Zablocki v. Redhail, 434 U.S. 378 (1978), the Court again struck down a law as infringing the right to marry. A Wisconsin law prevented an individual from obtaining a marriage license without court approval if the person had a minor child not in his or her custody for whom there was a court order to pay support. The court could grant

permission to marry only if there was proof that all child support payments were up to date.

The Supreme Court began by reviewing the cases where it had spoken of the right to marry as a fundamental right and said that "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." The Court explained that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."

Moreover, the Court said that if the "right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."

The Court accepted the state's claim that it had a substantial state interest in ensuring that child support was paid for minor children. But the Court found that the law was not sufficiently related to that end and thus concluded that it violated equal protection. The Court explained that the law prevented individuals who were unable to pay the owed child support from getting married, but "without delivering any money at all into the hands of the applicant's prior children." Also, the Court noted that the state had many alternative ways of ensuring that child support was paid that were less restrictive of the right to marry, such as through wage garnishment, civil contempt, and criminal prosecutions.

Justices Stewart and Powell wrote separate concurring opinions in *Zablocki* and argued that the case should have been decided under due process rather than equal protection analysis. Although they would have used a different constitutional basis for finding the right to marry, their conclusion was the same: The law impermissibly interfered with the right to marry.

The opinions in *Zablocki* discuss two earlier cases, one of which, Boddie v. Connecticut, protected the right to marry, and the other, Califano v. Jobst, found that a state law did not interfere with that right. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court ruled that a state law requiring the payment of filing fees and court costs to receive a divorce violated indigent individuals' due process rights. At the outset of its analysis, the Supreme Court observed, "As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society." Obviously, preventing individuals from obtaining a divorce precludes them from exercising their right to marry someone else.

Not every law that impacts on the right to marry has been declared unconstitutional. As explained above, the Supreme Court has said that there must be a direct and substantial interference with the right in order to trigger heightened scrutiny. In Califano v. Jobst, 434 U.S. 47 (1977), the Court upheld the constitutionality of a provision of the Social Security Act that terminated benefits for disabled children, who were covered as dependents of wage earners, at the time they got married. The law had an exception if a child married a person who also was entitled to benefits under the act.

The Court acknowledged that the termination of benefits might have an impact on a person's desire to marry, but the Court said that a "general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." The Court unanimously concluded that it was permissible for Congress to assume that "a married person is less likely to be dependent on his parents for support than one who is unmarried."

Similarly, in Bowen v. Owens, 476 U.S. 340 (1986), the Court rejected a challenge to another provision of the Social Security Act. The act provided survivor benefits from a wage earner's account to a widowed spouse who remarried after age 60 but denied such benefits to a similarly situated divorced widowed spouse. The law in essence created a divorce penalty allowing nondivorced widowed spouses to continue to receive benefits but denying continuing benefits to divorced spouses who remarried.

The Court said that "it was rational for Congress to assume that divorced widowed spouses are generally less dependent upon the resources of their former spouses than are widows and widowers." Thus, "[p]resumably Congress concluded that remarriage sufficiently reduced that lesser dependency to the point where it could conclude that benefits no longer were appropriate."

Califano v. Jobst and Bowen v. Owens reflect the principle that a right is not violated unless there has been a direct and substantial interference. Also, cases such as *Califano* and *Bowen* undoubtedly are, in part, about judicial deference to legislative decisions about how to allocate scarce funds in a program such as Social Security. Lines inevitably must be drawn, and the Court is understandably reluctant to second-guess the legislature unless there is discrimination against a suspect class or a clear infringement of a fundamental right. These cases, however, in no way deny that the right to marry is regarded as a fundamental right and that generally the government must meet strict scrutiny before interfering with this basic liberty.

The scope of the right to marry came before the Court in two recent cases concerning marriage equality for gays and lesbians. In United States v. Windsor, 570 U.S. 744 (2013), the Court declared unconstitutional as denying equal protection Section 3 of the Defense of Marriage Act, which provided that for federal law purposes marriage must be between a man and a woman. Section 3 of DOMA stated:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Justice Kennedy, writing for the Court, in a 5-4 decision, emphasized that traditionally marriage has been regulated by the states: "In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been

regarded as a virtually exclusive province of the States.' . . . Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. '[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"

The Court concluded that DOMA violated due process and equal protection:

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. DOMA cannot survive under these principles. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.
>
> The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.
>
> The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.
>
> Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.

> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

Chief Justice Roberts wrote a dissent and said that "Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry."

Justice Scalia dissented and declared:

> This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.
>
> As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.
>
> However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, which State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? DOMA avoided all of this uncertainty by specifying

which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

Justice Alito also dissented and wrote:

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting §3 of the Defense of Marriage Act (DOMA), which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution" suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental

rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

p. 915

Two years later, in Obergefell v. Hodges, the Court considered the constitutionality of state laws prohibiting same-sex marriage.

OBERGEFELL v. HODGES

135 S. Ct. 2584 (2015)

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. 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. 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.

Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain

strangers even in death, a state-imposed separation Obergefell deems “hurtful for the rest of time.” He brought suit to be shown as the surviving spouse on Arthur’s death certificate.

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.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation’s experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” 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. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In Loving v. Virginia (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." The Court reaffirmed that holding in Zablocki v. Redhail (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."

Choices about marriage shape an individual's destiny. The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as

expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

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.

Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence,* same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Marriage also affords the permanency and stability important to children's best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

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.

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. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection

Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

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 Justice SCALIA and Justice THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has

undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." Lochner v. New York (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people

acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." As petitioners put it, "times can blind." But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

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 majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions.

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. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will.

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work."

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 385-386 (1985). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise

religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise"* religion. Ominously, that is not a word the majority uses.

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I join The Chief Justice's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today): "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not.

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has

"neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document.

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual

freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it. Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

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

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" Washington v. Glucksberg (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See United States v. Windsor (2013) (Alito, J., dissenting).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Since *Obergefell* in 2015, there only has been one Supreme Court case touching on the issue of marriage equality. In Pavan v. Smith, 137 S. Ct. 2075 (2017), the Court, in a per curiam opinion, struck down an Arkansas law that did not allow both spouses in a same-sex couple to have their name on a child's birth certificate. The Court explained that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'" The Court said that under Arkansas law, the state would not "issue birth certificates including the female spouses of women who give birth in the State." The Court said that was unconstitutional "[b]ecause that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'"

Justice Gorsuch wrote a strong dissent, joined by Justices Thomas and Alito. It argued that *Obergefell* had not resolved this issue, and underlying the dissent was a continuing vehement disagreement with that decision.

2. The Right to Custody of One's Children

The Supreme Court has recognized that parents have a fundamental right to custody of their children. The Court has remarked that a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right."[14] The Court has made it clear that there must be a very substantial reason before parental custody can be terminated. The Court observed, "We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"[15]

STANLEY v. ILLINOIS, 405 U.S. 645 (1972): Justice WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children.

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska (1923), "basic civil rights of man," Skinner v. Oklahoma ex rel. Williamson (1942), and "(r)ights far more precious . . . than property rights," May v. Anderson (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana (1968). These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

We do not question the assertion that neglectful parents may be separated from their children. But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

In other cases, however, the Supreme Court has ruled that the government can terminate the rights of unmarried fathers without being required to provide due process. Lehr v. Robertson, 463 U.S. 248 (1983), involved a nonmarital father who had not supported his two-year-old child and had not registered his interest in paternity in a putative father's registry maintained by the state. The Supreme Court held that the state could terminate the father's parental rights without providing notice or a hearing.

The Court distinguished *Stanley* because in that case the father had been actively involved in his children's lives. The Court observed, "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection."

One of the most important cases limiting the rights of unmarried fathers is Michael H. v. Gerald D.

MICHAEL H. v. GERALD D.

491 U.S. 110 (1989)

Justice SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins, and in all but footnote 6 of which Justice O'CONNOR and Justice KENNEDY join.

Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances. The instant appeal presents the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father.

I

The facts of this case are, we must hope, extraordinary. On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model, and Gerald D., a top executive in a French oil company, were married. The couple established a home in Playa del Rey, California, in which they resided as husband and wife when one or the other was not out of the country on business. In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H. In September 1980, she conceived a child, Victoria D., who was born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter. Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father.

In the first three years of her life, Victoria remained always with Carole, but found herself within a variety of quasi-family units. In October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California. At the end of that month, Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California, where she took up residence with yet another man, Scott K. Later that spring, and again in the summer, Carole and Victoria spent time with Gerald in New York City, as well as on vacation in Europe. In the fall, they returned to Scott in California.

In November 1982, rebuffed in his attempts to visit Victoria, Michael filed a filiation action in California Superior Court to establish his paternity and right to visitation. In March 1983, the court appointed an attorney and guardian ad litem to represent Victoria's interests. Victoria then filed a cross-complaint asserting that if she had more than one psychological or de facto father, she was entitled to maintain her filial relationship, with all of the attendant rights, duties, and obligations, with both.

In May 1983, Carole filed a motion for summary judgment. During this period, from March through July 1983, Carole was again living with Gerald in New York. In August, however, she returned to California, became involved once again with Michael, and instructed her attorneys to remove the summary judgment motion from the calendar. For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole and Victoria in Carole's apartment in Los Angeles and held Victoria out as his daughter. In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's natural father. Carole left Michael the next month, however, and instructed her attorneys not to file the stipulation. In June 1984, Carole reconciled with Gerald and joined him in New York, where they now live with Victoria and two other children since born into the marriage.

In May 1984, Michael and Victoria, through her guardian ad litem, sought visitation rights for Michael. To assist in determining whether visitation would be in Victoria's best interests, the Superior Court appointed a psychologist to evaluate Victoria, Gerald, Michael, and Carole. The psychologist recommended that Carole retain sole custody, but that Michael be allowed continued contact with Victoria pursuant to a restricted visitation schedule.

On October 19, 1984, Gerald, who had intervened in the action, moved for summary judgment on the ground that under Cal. Evid. Code §621 there were no triable issues of fact as to Victoria's paternity. This law provides that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." The presumption may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife.

On January 28, 1985, having found that affidavits submitted by Carole and Gerald sufficed to demonstrate that the two were cohabiting at conception and birth and that Gerald was neither sterile nor impotent, the Superior Court granted Gerald's motion for summary judgment, rejecting Michael's and Victoria's challenges to the constitutionality of §621. The court also denied their motions for continued visitation.

II

We address first the claims of Michael. At the outset, it is necessary to clarify what he sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared the father of Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody, a status which "embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship."

Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.

It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court."

In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts (1934) (Cardozo, J.). Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that

underlie our society. . . .” Griswold v. Connecticut (1965) (Harlan, J., concurring in judgment).

This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights. Michael reads the landmark case of Stanley v. Illinois (1972), and the subsequent cases as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

The presumption of legitimacy was a fundamental principle of the common law. H. Nicholas, Adulturine Bastardy 1 (1836). Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.

What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance Michael’s claim. Thus, it is ultimately irrelevant, even for purposes of determining current social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father—including the natural father who has not established a relationship with the child—the theoretical power to rebut the marital presumption. What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[16]

We do not accept Justice Brennan’s criticism that this result “squashes” the liberty that consists of “the freedom not to conform.” It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a “liberty” of sorts without contracting an equivalent “liberty” on the other side. Such a happy choice is rarely available. Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa. If Michael has a “freedom not to conform” (whatever that means), Gerald must equivalently have a “freedom to

conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.

We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's.

[W]hatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-à-vis Gerald, she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.

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

Five Members of the Court refuse to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." p. 936

Once we recognized that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment encompasses more than freedom from bodily restraint, today's plurality opinion emphasizes, the concept was cut loose from one natural limitation on its meaning. This innovation paved the way, so the plurality hints, for judges to substitute their own preferences for those of elected officials. Dissatisfied with this supposedly unbridled and uncertain state of affairs, the plurality casts about for another limitation on the concept of liberty.

It finds this limitation in "tradition." Apparently oblivious to the fact that this concept can be as malleable and as elusive as "liberty" itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for "tradition" involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations.

It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents. Citing barely a handful of this Court's numerous decisions defining the

scope of the liberty protected by the Due Process Clause to support its reliance on tradition, the plurality acts as though English legal treatises and the American Law Reports always have provided the sole source for our constitutional principles. They have not. Just as common-law notions no longer define the "property" that the Constitution protects, see Goldberg v. Kelly (1970), neither do they circumscribe the "liberty" that it guarantees.

Today's plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.

If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, Eisenstadt v. Baird (1972), or even by married couples, Griswold v. Connecticut (1965); the freedom from corporal punishment in schools, Ingraham v. Wright (1977); the freedom from an arbitrary transfer from a prison to a psychiatric institution, Vitek v. Jones (1980); and even the right to raise one's natural but illegitimate children, Stanley v. Illinois (1972), were not "interest[s] traditionally protected by our society," at the time of their consideration by this Court. If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no." That we did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today.

The plurality's interpretive method is more than novel; it is misguided. It ignores the good reasons for limiting the role of "tradition" in interpreting the Constitution's deliberately capacious language. In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did. Moreover, by describing the decisive question as whether Michael's and Victoria's interest is one that has been "traditionally protected by our society," rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to "discern the society's views," the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must

include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Thus, to describe the issue in this case as whether the relationship existing between Michael and Victoria "has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection," is to reinvent the wheel. On four prior occasions, we have considered whether unwed fathers have a constitutionally protected interest in their relationships with their children. Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so. The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael "Daddy," Michael contributed to Victoria's support, and he is eager to continue his relationship with her.

The atmosphere surrounding today's decision is one of make-believe. Beginning with the suggestion that the situation confronting us here does not repeat itself every day in every corner of the country, moving on to the claim that it is tradition alone that supplies the details of the liberty that the Constitution protects, and passing finally to the notion that the Court always has recognized a cramped vision of "the family," today's decision lets stand California's pronouncement that Michael—whom blood tests show to a 98 percent probability to be Victoria's father—is not Victoria's father. When and if the Court awakes to reality, it will find a world very different from the one it expects.

3. The Right to Keep the Family Together

The Supreme Court has recognized a fundamental right to keep the family together that includes an extended family. The key case was Moore v. City of East Cleveland.

MOORE v. CITY OF EAST CLEVELAND, OHIO

431 U.S. 494 (1977)

Justice POWELL announced the judgment of the Court, and delivered an opinion in which Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories

of related individuals. Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death. In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $25 fine.

II

The city argues that our decision in Village of Belle Terre v. Boraas (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. [W]e sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from Belle Terre. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither Belle Terre nor Euclid governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed

drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

III

The city suggests that any constitutional right to live together as a family extends only to the nuclear family, essentially a couple and their dependent children. But unless we close 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 cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and], solid recognition of the basic values that underlie our society." Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. By the same token the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.

Justice STEWART, with whom Justice REHNQUIST joins, dissenting.

In Village of Belle Terre v. Boraas, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment or infringe any other rights or freedoms protected by the Constitution.

To be sure, the ordinance involved in Belle Terre did not prevent blood relatives from occupying the same dwelling, and the Court's decision in that case does not, therefore, foreclose the appellant's arguments based specifically on the ties of kinship present in this case. Nonetheless, I would hold that the existence of those ties does not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection.

Although the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire can hardly be equated with any of the interests protected in the cases just cited. The ordinance about which the appellant complains did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared. The ordinance clearly does not prevent parents from living together or living with their unemancipated offspring.

Obviously, East Cleveland might have as easily and perhaps as effectively hit upon a different definition of "family." The point is that any definition would produce hardships in some cases without materially advancing the legislative purpose. That this ordinance also does so is no reason to hold it unconstitutional, unless we are to use our power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces. It is not for us to rewrite the ordinance, or substitute our judgment for the discretion of the prosecutor who elected to initiate this litigation.

The Court has emphasized that individuals must be related to one another to be considered a family. For example, in *Moore*, the Court distinguished the earlier decision in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), where the Court had upheld a similar zoning ordinance that limited the number of unrelated people who could live together in one household. In *Belle Terre*, a group of college students who wanted to share a house brought a constitutional challenge to the ordinance. The Court in *Moore* emphasized that *Belle Terre* had involved only "*unrelated* individuals" and, in fact, the zoning ordinance there had an exception for "all who were related by 'blood, adoption, or marriage.'"

The Court invoked the same distinction between relatives and non-relatives in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977), which concerned the rights of foster parents. The Supreme Court held that the state did not violate due process in providing preremoval hearings only to foster parents who had been with a child for 18 months or more. The Court observed that although its prior decisions had involved a biological relationship, "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship."

However, the Court also saw key differences between biological parents and foster parents. The Court said that "whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset." Also, the Court stressed that protecting a liberty interest for foster parents often would be at the expense of the liberty of natural parents.

The Court concluded that it did not need to resolve the nature of the liberty interest of foster parents because the state law provided adequate protections even assuming rights of foster parents. The Court said that due process did not require that there be a hearing every time a child was removed from a foster home and that it was sufficient for the government to provide pre-removal due process for those foster parents who had been with a child for more than 18 months.

4. The Right of Parents to Control the Upbringing of Their Children

The first Supreme Court cases recognizing family autonomy involved the right of parents to control the upbringing of their children. It is notable that they were decided during the *Lochner* era and expressly use substantive due process to protect this right. Although economic substantive due process was abandoned in 1937, as discussed in Chapter 6, the Supreme Court's decisions of that era protecting parental decision making are very much still followed.

MEYER v. NEBRASKA

262 U.S. 390 (1923)

Justice McReynolds delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years. The information is based upon "An act relating to the teaching of foreign languages in the state of Nebraska," approved April 9, 1919, which follows:

> Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

> Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
>
> Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense. The Supreme Court of the state affirmed the judgment of conviction.

The Supreme Court of the state affirmed the judgment of conviction. While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this 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. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment. p. 943

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

> That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of

great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

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 character 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 therefore in time of peace and domestic tranquility has been shown. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

PIERCE v. SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS & MARY, 268 U.S. 510 (1925): Justice McReynolds delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act adopted November 7, 1922, under the initiative provision of her Constitution by the voters of Oregon. The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 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.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees’ primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees 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. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of Meyer v. Nebraska, 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.

But the Court also has recognized that the right to make parenting decisions is not absolute and can be interfered with by the state if necessary to protect a child. For example, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld the application of child labor laws to a nine-year-old girl who was soliciting for the Jehovah's Witnesses religion at the direction of her parents. The Court acknowledged that there is a "private realm of family life which the state cannot enter." But the Court said that "the family itself is not beyond regulation in the public interest. . . . Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." The Court said that the need to protect children from being exploited and harmed justified upholding laws prohibiting child labor, even if the work was at the direction of the parents and even if it was undertaken for religious purposes.

In weighing the competing claims of parents and of the state on behalf of children, the Supreme Court has given great deference to parents.[17] In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court held that Amish parents had a constitutional right, based on their right to control the upbringing of their children and based on free exercise of religion, to exempt their 14- and 15-year-old children from a compulsory school attendance law. The Court said that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children."

The Court gave great weight to the parents' claim that additional education would threaten their children's religious beliefs and to the uniquely insulated nature of the Amish culture. The Court accepted the argument that applying the mandatory schooling law to 14- and 15-year-old Amish children would interfere with free exercise of religion and with the ability of parents to make decisions concerning their children. The Court noted that there was no evidence of "any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare." The Court thus concluded that "[u]nder the doctrine of Meyer v. Nebraska we think it entirely plain that the Act . . . interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

The Court's substantial deference to parents also is reflected in Parham v. J.R., 442 U.S. 584 (1979). *Parham* presented the question of what type of procedural due process must be accorded to children when their parents commit them to an institution. The Supreme Court had earlier ruled that except in an emergency, before an adult can be committed to an institution there must be notice and a hearing.[18] But the Court said that the assumption must be that a parent is acting in the best interests of a child when making a commitment decision.

The Court recognized that some parents might abuse the power to institutionalize a child but said that this was not a sufficient basis for treating commitment of children like commitment of adults. Chief Justice Burger, writing for the Court, stated, "That some parents may at times be acting against the interests of their children . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human

experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."

Thus, the Court concluded that before a parent can institutionalize a child, there only need be a screening by a doctor or other neutral fact finder. A child, unlike an adult, did not have to be given notice and an evidentiary hearing. The dissenting opinion by Justice Brennan, joined by Justices Marshall and Stevens, emphasized the "massive curtailment of liberty" inherent to institutionalization and the need to protect children from the possibility of erroneous commitment. The dissent said that "[c]hildren incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. . . . And fairness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice."

The Court's most recent decision in this area, albeit almost 20 years ago, strongly reaffirmed the constitutional right of parents to control the upbringing of their children.

TROXEL v. GRANVILLE

530 U.S. 57 (2000)

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabella and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that §26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents.

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "[a]ny person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child."

That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give §26.10.160(3) a narrower reading, but it declined to do so.

Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that §26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays[, w]hile the Troxels requested two weekends per month and two full weeks in the summer.

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight.

Accordingly, we hold that §26.10.160(3), as applied in this case, is unconstitutional. Because we rest our decision on the sweeping breadth of §26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care."

Justice SOUTER, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more. The issues that might well be presented by reviewing a decision addressing the specific application of the state statute by the trial court, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process.

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case. Its ruling rested on two independently sufficient grounds: the failure of the statute to require harm to the child to justify a disputed visitation order, and the statute's authorization of "any person" at "any time" to petition and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights, subject only to the State's particular best-interests standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

Justice THOMAS, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.

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Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in Pierce v. Society of Sisters (1925) holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice STEVENS, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

Justice SCALIA, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men . . . are endowed by their Creator." And in my view that right is also among the "othe[r][rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

D. CONSTITUTIONAL PROTECTION FOR REPRODUCTIVE AUTONOMY

The Supreme Court has recognized three aspects of reproductive autonomy to be fundamental rights: the right to procreate, the right to purchase and use contraceptives, and the right to abortion.

1. The Right to Procreate

The Supreme Court has held that the right to procreate is a fundamental right and therefore government-imposed involuntary sterilization must meet strict scrutiny. Initially, the Court rejected this position.

BUCK v. BELL, 274 U.S. 200 (1927): Justice HOLMES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the 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 the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error 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 at the time of the trial of her case in the Circuit Court in the latter part of 1924.

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, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged 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, etc.

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. Three generations of imbeciles are enough.

The Court described Carrie Buck as a "feeble-minded white woman." In fact, in 1980, Carrie Buck was found to be alive and living with her sister, who also had been sterilized by the state. Carrie Buck was discovered to be a woman of normal intelligence.[19] She was one of almost 20,000 "forced eugenic sterilizations" that had been performed in the United States by 1935.[20]

The Supreme Court never has overruled Buck v. Bell or repudiated Justice Holmes's opinion, but Skinner v. Oklahoma, 15 years later, implicitly does so by recognizing a fundamental right to procreate. During the time between the two cases, the eugenics movement waned, certainly in large part after people saw the horrors of its implementation in Nazi Germany.

SKINNER v. OKLAHOMA EX REL. WILLIAMSON

316 U.S. 535 (1942)

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" either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.

Petitioner was convicted in 1926 of the crime of stealing chickens and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with firearms and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision.

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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, farreaching 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.

Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has

biologically inheritable traits which he who commits embezzlement lacks. 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 concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause. If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none. And so 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.

2. The Right to Purchase and Use Contraceptives

A second aspect of reproductive freedom is the right to purchase and use contraceptives. Griswold v. Connecticut is the initial case here and an important decision in the debate over the proper method of constitutional interpretation.

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GRISWOLD v. CONNECTICUT

381 U.S. 479 (1965)

Justice DOUGLAS delivered the opinion of the Court.

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

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

The statutes whose constitutionality is involved in this appeal provide: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more

than one year or be both fined and imprisoned." "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." The appellants were found guilty as accessories and fined $100 each.

[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. State of New York should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish; Olsen v. State of Nebraska; Lincoln Federal Labor Union v. Northwestern Co.; Williamson v. Lee Optical Co. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

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

By Pierce v. Society of Sisters, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. State of Nebraska, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.

The 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." We have had many controversies over these penumbral rights of "privacy and repose."

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." 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 THE CHIEF JUSTICE 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. 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. I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

While this Court has had little occasion to interpret the Ninth Amendment, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison. In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." 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.' . . ."

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms."

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in Poe v. Ullman, "Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by

the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Justice HARLAN, concurring in the judgment.

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. State of Connecticut. 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.

Judicial self-restraint will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

Justice WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. 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. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships.

Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration.

I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Justice BLACK, with whom Justice STEWART joins, dissenting.

I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given.

For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers Harlan, White and Goldberg for invalidating the Connecticut law. 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.

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can

avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy.

The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law.

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

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.

It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

The Court reaffirmed and extended *Griswold* in Eisenstadt v. Baird.

EISENSTADT v. BAIRD

405 U.S. 438 (1972)

Justice BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.

Massachusetts General Laws Ann. under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in §21A. Under §21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of §21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees—first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease.

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts laws. Section 21 stems from an 1879 statute, which prohibited without exception, distribution of articles intended to be used as contraceptives. In Commonwealth v. Allison (1917), the Massachusetts Supreme Judicial Court explained that the law's "plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women."

[W]e cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law. It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective.

If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? Whatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike.

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.

[I]f *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.

Chief Justice BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. I see nothing in the Fourteenth Amendment or any other part of the Constitution that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge Griswold v. Connecticut despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.

The Court also protected the right to purchase and use contraceptives in Carey v. Population Services International, 431 U.S. 678 (1977). In *Carey*, the Court declared unconstitutional a New York law that made it a crime to sell or distribute contraceptives to minors under age 16, for anyone other than a licensed pharmacist to distribute contraceptives to persons over age 15, and for anyone to advertise or display contraceptives. The Court reviewed the cases concerning family and procreational autonomy and said that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." The Court thus said that strict scrutiny must be met for the government to justify a law restricting access to contraceptives. Justice Brennan, writing for the Court, said, "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."

Thus, the Court found that limiting distribution of contraceptives to licensed pharmacists unduly restricted access to birth control and infringed the right to control procreation. Additionally, the Court found that the law violated the rights of those under age 16 to have access to contraceptives. The Court explained, “Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to a minor is a fortiori foreclosed.” The Court doubted that prohibiting distribution of contraceptives would deter teenage sexual activity and, in any event, thought it irrational that the state would want an unwanted pregnancy to be the punishment for fornication.

3. The Right to Abortion

Few decisions in Supreme Court history have provoked the intense controversy that has surrounded the abortion rulings. The debate, in part, is over constitutional methodology. Should the Court protect such a right that is not mentioned in the text and was not clearly intended by the framers? This, of course, is the same methodological question that can be asked about all of the unenumerated rights concerning family and reproductive autonomy protected by the Court. Also, the heated battle over abortion reflects the strong sentiments on both sides. There simply is no middle ground between those who believe that abortion is murder and those who reject that view and believe that a woman should not be forced by the state to be an incubator.

In examining the right to abortion, analysis is divided into five parts. The first subsection reviews the Supreme Court’s conclusion that the Constitution protects the right of women to choose to terminate their pregnancies prior to viability. Roe v. Wade and Planned Parenthood v. Casey are presented in detail. The second subsection considers what types of state regulations of abortion are permissible and which are unconstitutional. The third subsection presents the decisions concerning laws that prohibit the use of government funds or facilities for performing abortions. The fourth subsection examines a particular type of government regulation that has been declared unconstitutional: spousal consent and spousal notification requirements for married women’s abortions. Finally, the last subsection reviews the law concerning the ability of a state to require parental notice and/or consent for an unmarried minor’s abortion.

a. The Recognition and Reaffirmation of the Right to Abortion

ROE v. WADE

410 U.S. 113 (1973)

Justice Blackmun delivered the opinion of the Court.

[I]

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards

one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.

[II]

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, and that "it was resorted to without scruple." The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion." Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians.

3. The common law. It is undisputed that at common law, abortion performed before "quickening"—the first recognizable movement of the fetus in utero, appearing usually

from the 16th to the 18th week of pregnancy—was not an indictable offense. The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed.

4. The American law. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code. By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

[III]

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence. It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any

interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

It is with these interests, and the weight to be attached to them, that this case is concerned.

[IV]

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

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, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

A. The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The Constitution does not define "person" in so many words. [T]his, together with our observation, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.

[T]hose in the [Catholic] Church would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

[V]

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

Justice REHNQUIST, dissenting.

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. Katz v. United States (1967).

If the Court means by the term “privacy” no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of “liberty” protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. Williamson v. Lee Optical Co. (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson.* But the Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one. The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” Snyder v. Massachusetts (1934).

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and “has remained substantially unchanged to the present time.”

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

By the 1990s, the change in the composition of the Supreme Court raised questions as to whether Roe v. Wade would be overruled. In 1989, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), four justices seemed poised to overrule *Roe.* A Missouri law declared the state’s view that life begins at conception, prohibited the use of government funds or facilities from performing or “encouraging or counseling” a woman to have an abortion, and allowed abortions after 20 weeks of pregnancy only if a test

was done to ensure that the fetus was not viable. The Supreme Court upheld the Missouri law, but without a majority opinion.

Chief Justice Rehnquist, in a plurality opinion joined by Justices White and Kennedy, strongly criticized *Roe*. Rehnquist attacked the trimester distinctions that were used by *Roe* to balance the rights of the mother and the state's interest in protecting the fetus. Rehnquist wrote, "[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms. . . . The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."

Even more important, Rehnquist said, "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability, but prohibiting it before viability. . . . The State's interest, if compelling after viability, is equally compelling before viability." Although Rehnquist's opinion did not expressly urge the overruling of Roe v. Wade, that was the unmistakable implication of declaring that the state has a compelling interest in protecting fetal life from the moment of conception. Rehnquist and White were the two dissenters in *Roe*, and they had consistently argued for overruling it.

Justice Scalia wrote a separate opinion concurring in part and concurring in the judgment. He said that the plurality opinion "effectively would overrule Roe v. Wade." He said, "I think that should be done, but would do it more explicitly." He argued that the failure to overrule *Roe* "needlessly . . . prolong[s] this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical."

Justice O'Connor provided the fifth vote for the result in *Webster*, but she ruled only on the specifics of the Missouri law and did not opine on the question of whether *Roe* should be overruled. O'Connor noted that the Missouri law did not prohibit abortions and thus "there is no necessity to accept the state's invitation to reexamine the constitutional validity of *Roe.*" She said that "[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of Roe v. Wade, there will be time enough to reexamine *Roe.* And to do so carefully."

The dissent in *Webster* saw a Court on the verge of overruling *Roe.* Justice Blackmun, joined by Justices Brennan and Marshall, lamented, "Today, Roe v. Wade and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. . . . [T]he plurality discards a landmark case of the last generation and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her right to exercise some control over her unique ability to bear children. . . . For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

Between 1989, when *Webster* was decided, and 1992, when Planned Parenthood v. Casey was before the Court, Justices Brennan and Marshall had resigned and were replaced, respectively, by Justices Souter and Thomas. It was thought that either of

them, and particularly Justice Clarence Thomas, might cast the fifth vote to overrule Roe v. Wade. Indeed, the United States, through the solicitor general, urged the Court in *Casey* to use it as the occasion for overruling *Roe*. The Court, however, did not do so. But an unusual joint opinion by Justices O'Connor, Kennedy, and Souter overruled the trimester distinctions used in *Roe* and also the use of strict scrutiny for evaluating government regulation of abortions. *Casey* remains the major case articulating current protections and constitutional standards for the right to abortion. Below are excerpts from *Casey* that discuss whether *Roe* should be overruled and the standard to be used in evaluating abortion laws. The discussion in *Casey* of specific types of regulation—such as waiting periods, spousal notification, and parental consent—is presented below as each of those issues is considered.

PLANNED PARENTHOOD v. CASEY

505 U.S. 833 (1992)

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, Roe v. Wade (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe.*

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in §3203 of the Act. In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services.

[W]e acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, the Chief Justice admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia (1967). Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to

define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird. Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis. We turn now to that doctrine.

III

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.

So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," representing as it does a simple limitation beyond which a state law is unenforceable.

While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be de minimis. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of stare decisis. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child. The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe.* We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to

further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "'[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'" It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe.* Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe.*

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

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.

We give this summary:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

Three years ago, in Webster v. Reproductive Health Services (1989), four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. But now, just when so many expected the darkness to fall, the flame has grown bright.

I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster.* And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'Connor and Kennedy postponed reconsideration of Roe v. Wade, the authors of the joint opinion today join Justice Stevens and me in concluding that "the essential holding of Roe v. Wade should be retained and once again reaffirmed."

State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.

Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no less an impact on a woman's life than decisions about contraception or marriage. Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices."

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing

women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."

The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. We have applied this principle specifically in the context of abortion regulations.

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe.* Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. The factual premises of the trimester framework have not been undermined, and the *Roe* framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

In sum, *Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's constitutional right with the State's legitimate interests.

At long last, the Chief Justice and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases." If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from the Chief Justice's opinion.

The Chief Justice's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. This constricted view is reinforced by the Chief Justice's exclusive reliance on tradition as a source of fundamental rights. In the Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called "sexual deviates." Given the Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than the Chief Justice's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and

motherhood have on women's lives. Nor does the Chief Justice give any serious consideration to the doctrine of stare decisis.

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.

In Roe v. Wade, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." The abortion decision must therefore "be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, *Abortion in America* 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history

supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny."

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in Webster v. Reproductive Health Services (1989). The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected —because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before Roe v. Wade was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe,* moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution guarantees abortion, how can it be bad?"—not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike

"settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

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b. Government Regulation of Abortions

There are many different ways in which government can regulate the performance of abortions. After Planned Parenthood v. Casey, the government can regulate abortions performed prior to viability as long as there is not an undue burden on access to abortions. The Supreme Court has considered the constitutionality of a number of types of restrictions. The two most recent decisions are presented below. Whole Woman's Health v. Hellerstedt (2016), in a 5-3 decision, struck down a Texas law imposing restrictions on abortion. By contrast, Gonzales v. Carhart (2007), in a 5-4 decision, upheld the federal Partial Birth Abortion Act. Both use the undue burden test, although they come to very different results.

WHOLE WOMAN'S HEALTH v. HELLERSTEDT

136 S. Ct. 2292 (2016)

Justice BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey* (1992), a plurality of the Court concluded that there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect*" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." The plurality added that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the "*admitting-privileges requirement,*" says that "[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced."

The second provision, which we shall call the "*surgical-center requirement,*" says that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers."

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution.

I

The District Court received stipulations from the parties and depositions from the parties' experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles."
2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually."
3. Prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013."

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas."

5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." These include "one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio."

6. "Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities."

7. The suggestion "that these seven or eight providers could meet the demand of the entire state stretches credulity."

8. "Between November 1, 2012 and May 1, 2014," that is, before and after enforcement of the admitting-privileges requirement, "the decrease in geographical distribution of abortion facilities" has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider. 46 F. Supp. 3d, at 681-682.

9. The "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women."

10. "The great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny."

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."

13. "[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."

14. The "cost of coming into compliance" with the surgical-center requirement "for existing clinics is significant," "undisputedly approach[ing] 1 million dollars," and

> "most likely exceed[ing] 1.5 million dollars," with "[s]ome . . . clinics" unable to "comply due to physical size limitations of their sites." The "cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars."

On the basis of these and other related findings, the District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, . . . in conjunction with the ambulatory- surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities."

II

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey.* We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." But, we added, "a statute which, while furthering [a] 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." Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts."

The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey,* however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings.

For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting-Privileges Requirement

Turning to the lower courts' evaluation of the evidence, we first consider the admitting-privileges requirement. The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. But the District Court found that it brought about no such health-related benefit. The court found that "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Thus, there was no significant health-related problem that the new law helped to cure.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws.

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement's effective date. Eleven more closed on the day the admitting-privileges requirement took effect.

Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year." In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding.

V

Undue Burden—Surgical-Center Requirement

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements.

There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. The District Court found that "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities." The court added that women "will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." And these findings are well supported.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement "will not [provide] better care or . . . more frequent positive outcomes." The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." We take this statement as a finding that these few facilities could not "meet" that "demand."

[T]he challenged provisions of H.B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women's health capable of withstanding any meaningful scrutiny. The provisions are unconstitutional on their face.

Justice GINSBURG, concurring.

The Texas law called H.B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H.B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. Given those realities, it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions."

So long as this Court adheres to Roe v. Wade (1973), and Planned Parenthood of Southeastern Pa. v. Casey (1992), Targeted Regulation of Abortion Providers laws like H.B. 2 that "do little or nothing for health, but rather strew impediments to abortion," cannot survive judicial inspection.

Justice THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court's troubling tendency "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue."

I remain fundamentally opposed to the Court's abortion jurisprudence. Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. Finally, even if a law imposes no "substantial obstacle" to women's access to abortions, the law now must have more than a "reasonabl[e] relat[ion] to . . . a legitimate state interest." These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object. But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

[Justice Alito's dissent focused primarily on why res judicata should have barred the Court from considering the issue and why the Court should have severed the particular provisions and not found the entire statute unconstitutional. He concluded:] When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here.

In Stenberg v. Carhart, 530 U.S. 914 (2000), the Supreme Court, in a five-to-four decision, invalidated a Nebraska law prohibiting so-called partial-birth abortion. The law made it a crime to remove a living fetus or a substantial part of a living fetus with the intent of ending the fetus's life. The Court found the law unconstitutional because it lacked a health exception and because it would have prohibited many forms of abortions.

The federal Partial-Birth Abortion Ban Act of 2003 lacks a health exception and seems broader than what the Court said it would uphold in *Stenberg.* A crucial difference, of

course, is that when the Court heard the *Gonzales* case, Justice O'Connor, a part of the majority in *Stenberg*, had been replaced by Justice Alito.

GONZALES v. CARHART

550 U.S. 124 (2007)

Justice KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003, a federal statute regulating abortion procedures. Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D&E" is the usual abortion method in this trimester. Although individual techniques for performing D&E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus.

The doctor examines the different parts to ensure the entire fetal body has been removed.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D&E. The medical community has not reached unanimity on the appropriate name for this D&E variation. It has been referred to as "intact D&E," "dilation and extraction" (D&X), and "intact D&X." For discussion purposes this D&E variation will be referred to as intact D&E. The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D&Es are performed in this manner.

Intact D&E, like regular D&E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified: "'[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.'"

This is an abortion doctor's clinical description. Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." Still other physicians reach into the cervix with their forceps and crush the fetus' skull. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it.

D&E and intact D&E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D&E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions.

B

By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here.

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. The operative provisions of the Act provide in relevant part:

> (a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.
>
> (b) As used in this section—
>
> > (1) the term "partial-birth abortion" means an abortion in which the person performing the abortion—
> >
> > > (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> >
> > > (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.
>
> (d) (1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> (e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

II

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations 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." Planned Parenthood v. Casey (1992), in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." It defines the unlawful abortion in explicit terms. First, the person performing the abortion must "vaginally delive[r] a living fetus." The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks'"—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark.

Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks. If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind.

B

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.

The Act prohibits a doctor from intentionally performing an intact D&E. The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery.

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.'" The Court concluded that this statute encompassed D&E because "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus."

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," instead of "'delivering . . . a living unborn child, or a substantial portion thereof.'"

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*. The Court in *Stenberg* interpreted "'substantial portion'" of the fetus to include an arm or a leg. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions.

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.

IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

a

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." The Act expresses respect for the dignity of human life.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is

partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world."

B

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'" The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." [W]hether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D&E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. Abortion doctors testified, for example, that intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D&E was safer for women with certain medical conditions or women with fetuses that had certain anomalies.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D&E always to be a safe alternative.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women.

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

This traditional rule is consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E. If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

V

The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

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As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases. The Act is open to a proper as-applied challenge in a discrete case. No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception.

Justice THOMAS, with whom Justice SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including Planned Parenthood of Southeastern Pa. v. Casey (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and Roe v. Wade (1973), has no basis in the Constitution. I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.

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

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion.

Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester.

In *Stenberg*, we expressly held that a statute banning intact D&E was unconstitutional in part because it lacked a health exception. We noted that there existed a "division of medical opinion" about the relative safety of intact D&E, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required.

B

In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women's health. The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. Many of the Act's recitations are incorrect. For example, Congress determined that no medical schools provide instruction on intact D&E. But in fact, numerous leading medical schools teach the procedure. More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. But the evidence "very clearly demonstrate[d] the opposite."

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods.

C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es." During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D&E is safer than alternative procedures and necessary to protect women's health.

According to the expert testimony plaintiffs introduced, the safety advantages of intact D&E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems. Further, plaintiffs' experts testified that intact D&E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus.

Intact D&E, plaintiffs' experts explained, provides safety benefits over D&E by dismemberment for several reasons: First, intact D&E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D&E. Second, removing the fetus intact, instead of dismembering it in utero, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. Third, intact D&E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. Fourth, intact D&E takes less operating time than D&E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia.

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure." The District Courts' findings merit this Court's respect.

II

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E sans any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [*Casey*'s] conclusion"—i.e., the Government's "legitimate and substantial interest in preserving and promoting fetal life." But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. And surely the statute was not designed to protect the lives or health of pregnant women. In short, the Court upholds a law that, while doing nothing to "preserv[e] . . . fetal life," bars a woman from choosing intact D&E although her doctor "reasonably believes [that procedure] will best protect [her]."

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D&E procedure. But why not, one might ask. Nonintact D&E could equally be characterized as "brutal," involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs. "[T]he notion that either of these two equally gruesome

procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D&E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[21]

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby," second-trimester, previability abortions are referred to as "late-term," and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, *Casey*'s principles, confirming the continuing vitality of "the essential holding of *Roe*," are merely "assume[d]" for the moment, rather than "retained" or "reaffirmed."

III

Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D&E would be unconstitutional "in a large fraction of relevant cases." But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is not "all women," nor "all pregnant women," nor even all women "seeking abortions." Rather, a provision restricting access to abortion, "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction." Thus the absence of a health exception burdens all women for whom it is relevant—women who, in the judgment of their doctors, require an intact D&E because other procedures would place their health at risk. It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions, including

those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case." Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D&E. A woman "suffer[ing] from medical complications[]" needs access to the medical procedure at once and cannot wait for the judicial process to unfold.

The Court's allowance only of an "as-applied challenge in a discrete case," jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve-out exceptions through piecemeal litigation for "discrete and well-defined instances," women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are "the proper manner to protect the health of the woman."

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."

Another type of government regulation of abortion is waiting periods. Prior to *Casey*, the Supreme Court had invalidated waiting periods for adult women's abortions. In City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), the Court declared unconstitutional a part of a city ordinance that prohibited a physician from performing an abortion until 24 hours after the pregnant woman signed a consent form. Justice Powell, writing for the Court, explained that the city had "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course."

However, in Planned Parenthood v. Casey, the Supreme Court used the undue burden test, rather than strict scrutiny as in *Akron*, and upheld the constitutionality of a waiting period. In fact, the joint opinion in *Casey* reviewed the invalidation of the waiting period in *Akron* and declared, "We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision."

The joint opinion in *Casey* argued that a waiting period is not an undue burden on access to abortion. The joint opinion acknowledged that the district court had found that because of travel and scheduling problems there often would be more than a day's delay before an abortion could be received and thus that waiting periods would increase the cost and risks of abortions. But the joint opinion concluded that 24-hour waiting periods are constitutional. It declared, "Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it." The four justices who favored overruling *Roe*—Rehnquist, White, Scalia, and Thomas—provided the other votes necessary to uphold the waiting period requirement.

Yet another type of government regulation of abortion are so-called informed consent requirements. The Supreme Court has had several occasions to consider "informed consent" requirements—laws that require that women be advised about the fetus and its characteristics at that stage of pregnancy. Again, prior to *Casey*, the Supreme Court had consistently invalidated these requirements, but after *Casey* they are much more likely to be upheld.

In Akron v. Akron Center for Reproductive Health, cited above, the Supreme Court also declared unconstitutional a part of a city ordinance that required that physicians inform women seeking abortions about the development of her fetus, that the "unborn child is a human life from the moment of conception," the date of possible viability, and the physical and emotional consequences that may result from an abortion. The Court said that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. . . . By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision."

Similarly, in Thornburgh v. American College of Obstetricians & Gynecologists (1986), the Court invalidated a Pennsylvania law that required, in part, that women be given seven different kinds of information at least 24 hours before they give consent for abortions. These included telling the woman that there may be unforeseeable detrimental physical and psychological effects to having an abortion, the possible availability of prenatal and childbirth medical care, and the father's liability to pay child support. Also, the physician had to inform the woman of the availability of printed materials that describe the anatomical and physiological characteristics of the "unborn child" at two-week gestational increments. The Court said that, as in *Akron*, the Pennsylvania law was unconstitutional because it was motivated by a desire to discourage women from having abortions and because it imposed a rigid requirement that a specific body of information be communicated regardless of the needs of the patient or the judgment of the physician.

In *Casey*, however, the Court upheld a provision virtually identical to that invalidated in *Thornburgh*, and the joint opinion said, "To the extent *Akron I* and *Thornburgh* find a constitutional violation where the government requires . . . the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases are inconsistent with *Roe*'s acknowledgment of an important interest in potential

life, and are overruled." Specifically, the Court upheld a section of the statute that required that women be told information and that they be informed of the availability of other materials that describe the fetus, provide information about medical care for childbirth, and that list adoption providers.

The shift from *Akron* and *Thornburgh* to *Casey* reflects the Court's abandoning the position that the state may not regulate abortions in a way to encourage childbirth. The issue that *Casey* leaves unresolved is how far the government can go in this direction in the form of informed consent laws. For example, do *Akron* and *Thornburgh* remain good law in that the government could not require that women be given detailed descriptions of the fetus, or shown photographs, or told that human life begins at conception? There is a strong argument that all of these go much further than the Pennsylvania law in *Casey* and thus that the Court might find them to be an undue burden on access to abortion.

c. Government Restrictions on Funds and Facilities for Abortions

The Supreme Court repeatedly has held that the government is not constitutionally required to subsidize abortions even if it is paying for childbirth. In 1977, the Court upheld the ability of the government to deny funding for "nontherapeutic abortions"—that is, abortions that were not performed to protect the life or health of the mother.

MAHER v. ROE

432 U.S. 464 (1977)

Justice POWELL delivered the opinion of the Court.

A regulation of the Connecticut Welfare Department limits state Medicaid benefits for first trimester abortions to those that are "medically necessary," a term defined to include psychiatric necessity. In this case, we must decide whether the Constitution requires a participating State to pay for nontherapeutic abortions when it pays for childbirth.

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. Appellees' claim is that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth. This challenge to the classifications established by the Connecticut regulation presents a question arising under the Equal Protection Clause of the Fourteenth Amendment.

This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial

need alone identifies a suspect class for purposes of equal protection analysis. Accordingly, the central question in this case is whether the regulation "impinges upon a fundamental right explicitly or implicitly protected by the Constitution."

Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe.* Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

We certainly are not unsympathetic to the plight of an indigent woman who desires an abortion, but "the Constitution does not provide judicial remedies for every social and economic ill." Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds.

The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

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

A distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis. The stark reality for too many, not just "some," indigent pregnant women is that indigency makes access to competent licensed physicians not merely "difficult" but "impossible." As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the

associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure. Mr. Justice Frankfurter's words are apt: "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by the State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' . . ." Griffin v. Illinois (1956) (concurring opinion).

In two companion cases to *Maher*, the Court upheld other restrictions on funding for nontherapeutic abortions. In Beal v. Doe, 432 U.S. 438 (1977), the Supreme Court held that the federal Medicaid Act did not require that states fund nontherapeutic first-trimester abortions as part of participating in the joint federal-state program. In Poelker v. Doe, 432 U.S. 519 (1977), the Court found that it was constitutional for a city to refuse to pay for nontherapeutic first-trimester abortions in its public hospital.

In 1980, the Supreme Court went further and upheld the constitutionality of laws that denied public funding for medically necessary abortions except where necessary to save the life of the mother.

HARRIS v. McRAE, 448 U.S. 297 (1980): Justice STEWART delivered the opinion of the Court.

This case presents constitutional questions concerning the public funding of abortions under Title XIX of the Social Security Act, commonly known as the "Medicaid Act," and recent annual Appropriations Acts containing the so-called "Hyde Amendment." The constitutional question is whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.

Since September 1976, Congress has prohibited—either by an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare or by a joint resolution—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the "Hyde Amendment," after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides: "[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service."

We address first the appellees' argument that the Hyde Amendment, by restricting the availability of certain medically necessary abortions under Medicaid, impinges on the "liberty" protected by the Due Process Clause as recognized in Roe v. Wade, and its

progeny. But the Court in *Wade* also recognized that a State has legitimate interests during a pregnancy in both ensuring the health of the mother and protecting potential human life. These state interests, which were found to be "separate and distinct" and to "gro[w] in substantiality as the woman approaches term," pose a conflict with a woman's untrammeled freedom of choice.

The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. The present case does differ factually from *Maher* insofar as that case involved a failure to fund nontherapeutic abortions, whereas the Hyde Amendment withholds funding of certain medically necessary abortions. Accordingly, the appellees argue that because the Hyde Amendment affects a significant interest not present or asserted in *Maher*—the interest of a woman in protecting her health during pregnancy—and because that interest lies at the core of the personal constitutional freedom recognized in *Wade*, the present case is constitutionally different from *Maher*.

But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it 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. The reason why was explained in *Maher*: although 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 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.* A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

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. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, Griswold v. Connecticut, or prevent parents from sending their child to a private school, Pierce v. Society of Sisters, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process

Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade.*

d. Spousal Consent and Notice Requirements

The Supreme Court has held that the government cannot require either spousal consent or spousal notification as a prerequisite for a married woman's obtaining an abortion.

PLANNED PARENTHOOD v. DANFORTH, 428 U.S. 52 (1976): Justice BLACKMUN delivered the opinion of the Court.

[Missouri law] requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."

The appellees defend [the law] on the ground that it was enacted in the light of the General Assembly's "perception of marriage as an institution," and that any major change in family status is a decision to be made jointly by the marriage partners. Reference is made to an abortion's possible effect on the woman's child bearing potential. It is said that marriage always has entailed some legislatively imposed limitations: Reference is made to adultery and bigamy as criminal offenses; to Missouri's general requirement that for an adoption of a child born in wedlock the consent of both parents is necessary; to similar joint-consent requirements imposed by a number of States with respect to artificial insemination and the legitimacy of children so conceived; to the laws of two States requiring spousal consent for voluntary sterilization; and to the long-established requirement of spousal consent for the effective disposition of an interest in real property.

We now hold that the State may not constitutionally require the consent of the spouse, as is specified under the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., Griswold v. Connecticut (1965). Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.

This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also, and more importantly, the State has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship."

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. We conclude that the Missouri Act is inconsistent with the standards enunciated in Roe v. Wade and is unconstitutional.

The Supreme Court invalidated a spousal notification requirement in Planned Parenthood v. Casey. The portion of *Casey* describing the general test for abortion is presented above. Justices O'Connor, Kennedy, and Souter issued a joint opinion in which they said that government regulation of abortions before viability would be allowed as long as there was not an undue burden on the right. They applied this test to strike down Pennsylvania's spousal notification requirement. Justices Blackmun and Stevens concurred in this part of the judgment and used strict scrutiny to strike down this requirement. Chief Justice Rehnquist and Justices White, Scalia, and Thomas dissented.

PLANNED PARENTHOOD v. CASEY

505 U.S. 833 (1992)

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court.

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence.

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted their wives during the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "[r]esearchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific Affairs, Violence Against Women 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault.

Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8 percent of all homicide victims in the United States are killed by their spouses. Thirty percent of female homicide victims are killed by their male partners.

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions

such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from §3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from §3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, §3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, §3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by §3209.

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that §3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of §3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See Miami Herald Publishing Co. v. Tornillo (1974). 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.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird. The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In keeping with our rejection of the common-law understanding of a woman's role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth.* The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify—a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that §3209 is invalid.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "[t]he Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion."

The State also has a legitimate interest in promoting "the integrity of the marital relationship." This Court has previously recognized "the importance of the marital relationship in our society." In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity.

Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion

decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife.

The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect." The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution.

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e. Parental Notice and Consent Requirements

The Supreme Court has held that a state may require parental notice and/or consent for an unmarried minor's abortion but only if it creates an alternative procedure by which a minor can obtain an abortion by going before a judge who can approve the abortion by finding that it would be in the minor's best interest or by concluding that the minor is mature enough to decide for herself.

BELLOTTI v. BAIRD

443 U.S. 622 (1979)

Justice POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST joined.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions.

[Massachusetts law] provides in part: "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient." Physicians performing abortions in the absence of the consent required by §12S are subject to injunctions and criminal penalties.

A child, merely on account of his minority, is not beyond the protection of the Constitution. As the Court said in In re Gault (1967), "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." This observation, of course, is but the beginning of the analysis. The Court long has recognized that the status of minors under the law is unique in many respects.

The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," Moore v. East Cleveland (1977), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."

With these principles in mind, we consider the specific constitutional questions presented by these appeals. In §12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by Roe v. Wade (1973), with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child.

We previously had held in Planned Parenthood of Central Missouri v. Danforth (1976) that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. Appellees and intervenors contend that even as interpreted by the Supreme Judicial Court of Massachusetts, §12S does unduly burden this right. They suggest, for example, that the mere requirement of parental notice constitutes such a burden. [H]owever, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

In Roe v. Wade, we emphasized the importance of the role of the attending physician. Those cases involved adult women presumably capable of selecting and obtaining a competent physician. In this case, however, we are concerned only with minors who, according to the record, may range in age from children of 12 years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize

ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

For these reasons, as we held in Planned Parenthood of Central Missouri v. Danforth, "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Although such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her

physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth.*

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, concurring in the judgment.

Massachusetts requires the consent of both of the woman's parents. It does, of course, provide an alternative in the form of a suit initiated by the woman in superior court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests. In Massachusetts, then, the State has imposed an "absolute limitation on the minor's right to obtain an abortion," applicable to every pregnant minor in the State who has not married.

The provision of an absolute veto to a judge—or, potentially, to an appointed administrator—is to me particularly troubling. The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. In Massachusetts, however, every minor who cannot secure the consent of both her parents—which under *Danforth* cannot be an absolute prerequisite to an abortion—is required to secure the consent of the sovereign. As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.

In H.L. v. Matheson, 450 U.S. 398 (1981), the Supreme Court upheld a Utah law that required that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." The Court said that although "a state may not constitutionally legislate a blanket, unreviewable veto power of parents to veto their daughter's abortion, a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor." The Court emphasized that parents have a constitutional right to raise their children and that therefore the state has an important interest in making sure that parents are notified prior to an abortion on a teenage girl. The Court also stressed that the "Utah statute gives neither parents nor the judges a veto power over the minor's abortion decision." The Court said that the fact that the notice requirement might "inhibit some minors from seeking abortions is not a valid basis to void the statute."

Subsequently, the Supreme Court upheld parental notification requirements as long as they have the judicial bypass procedures outlined in *Bellotti.* In Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990), the Court upheld a law that required that notice be given to at least one parent of an unmarried minor before an abortion could be performed. The law allowed an abortion without such notification if a judge approved it either by finding it would be in the minor's best interests or by concluding that she is mature enough to decide for herself.

In Hodgson v. Minnesota, 497 U.S. 417 (1990), the Supreme Court upheld the constitutionality of an even more burdensome law that required that notice be given to both of a minor's parents before an abortion could be performed. The Court specifically ruled that a two-parent notification requirement without a judicial bypass procedure was unconstitutional but that such a requirement is permissible as long as there is a mechanism for judicial bypass.

E. CONSTITUTIONAL PROTECTION FOR MEDICAL CARE DECISIONS

Another major area where the Supreme Court has considered the existence of a fundamental right is with regard to medical care decisions. Specifically, two major issues considered by the courts are whether there is a constitutional right to refuse treatment and whether there is a constitutional right to physician-assisted suicide.

RIGHT TO REFUSE TREATMENT

Generally, there is a constitutional right of individuals to refuse medical treatment, but it certainly is not absolute and can be regulated by the state. For example, in Jacobson v. Massachusetts, 197 U.S. 11 (1905), the Supreme Court upheld a Massachusetts law that required vaccinations. The Court allowed the law because of the government's compelling interest in stopping the spread of communicable diseases.

In Washington v. Harper, 494 U.S. 210 (1990), the Court said that prisoners had the right to be free from the involuntary administration of antipsychotic drugs. The Court observed that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth

Amendment." The Court therefore said that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." However, the Court said that this interest was adequately protected by providing an inmate with notice and a hearing before a tribunal of medical and prison personnel at which the inmate could challenge the decision to administer the drugs.

The most important case, thus far, concerning a right to refuse medical care is Cruzan v. Director, Missouri Department of Health.

CRUZAN v. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH

497 U.S. 261 (1990)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari, and now affirm.

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State of Missouri is bearing the cost of her care.

After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal

Constitutions to refuse or direct the withdrawal of "death prolonging procedures." The court also found that Nancy's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." The Supreme Court of Missouri reversed by a divided vote.

We granted certiorari to consider the question whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.

At common law, even the touching of one person by another without consent and without legal justification was a battery. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. The informed consent doctrine has become firmly entrenched in American tort law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.

The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In Jacobson v. Massachusetts (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Washington v. Harper (1990).

But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural

safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decision-makers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it. Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy.

In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings. "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" Santosky v. Kramer (1982). Thus, such a standard has been required in deportation proceedings, in denaturalization proceedings, in civil commitment proceedings, and in proceedings for the termination of parental rights.

We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mill civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous

decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.

In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.

The Supreme Court of Missouri held that in this case the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. In so doing, it reversed a decision of the Missouri trial court which had found that the evidence "suggest[ed]" Nancy Cruzan would not have desired to continue such measures, but which had not adopted the standard of "clear and convincing evidence" enunciated by the Supreme Court. The testimony adduced at trial consisted primarily of Nancy Cruzan's statements made to a housemate about a year before her accident that she would not want to live should she face life as a "vegetable," and other observations to the same effect. The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. We cannot say that the Supreme Court of Missouri committed constitutional error in reaching the conclusion that it did.

Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect the views of the patient. No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may choose to defer only to those wishes, rather than confide the decision to close family members.[22]

Justice O'Connor, concurring.

I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, and that the refusal of artificially delivered food and water is encompassed within that liberty interest. I write separately to clarify why I believe this to be so.

As the Court notes, the liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. See, e.g., Rochin v. California (1952) ("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 . . . is bound to offend even hardened sensibilities"). Our Fourth Amendment jurisprudence has echoed this same concern. See Schmerber v. California (1966) ("The integrity of an individual's person is a cherished value of our society"); Winston v. Lee (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion.

The State's artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment. Whether or not the techniques used to pass food and water into the patient's alimentary tract are termed "medical treatment," it is clear they all involve some degree of intrusion and restraint. Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's nose, throat, and esophagus and into the stomach. Because of the discomfort such a tube causes, "[m]any patients need to be restrained forcibly and their hands put into large mittens to prevent them from removing the tube." A gastrostomy tube (as was used to provide food and water to Nancy Cruzan) must be surgically implanted into the stomach or small intestine. Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment. Few individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent. States which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent. Such failures might be avoided if the State considered an equally probative source of evidence: the patient's appointment of a proxy to make health care decisions on her behalf. Delegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future. Several States have recognized the practical wisdom of such a procedure by enacting durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment decisions. Some state courts have suggested that an agent appointed pursuant to a general durable power of attorney statute would also be empowered to make health care decisions on behalf of the patient. Other States allow an individual to designate a proxy to carry out the intent of a living will. These procedures for surrogate decisionmaking, which appear to be rapidly gaining

in acceptance, may be a valuable additional safeguard of the patient's interest in directing his medical care. Moreover, as patients are likely to select a family member as a surrogate, giving effect to a proxy's decisions may also protect the "freedom of personal choice in matters of . . . family life."

Today's decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate. Nor does it prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment. As is evident from the Court's survey of state court decisions, no national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States in the first instance.

Justice SCALIA, concurring.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable.

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

"Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity."

Nancy Cruzan has dwelt in that twilight zone for six years. She is oblivious to her surroundings and will remain so. Her body twitches only reflexively, without consciousness. The areas of her brain that once thought, felt, and experienced sensations have degenerated badly and are continuing to do so. The "'cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.'" "Nancy will never interact

meaningfully with her environment again. She will remain in a persistent vegetative state until her death." Because she cannot swallow, her nutrition and hydration are delivered through a tube surgically implanted in her stomach.

A grown woman at the time of the accident, Nancy had previously expressed her wish to forgo continuing medical care under circumstances such as these. Her family and her friends are convinced that this is what she would want. A guardian ad litem appointed by the trial court is also convinced that this is what Nancy would want. Yet the Missouri Supreme Court, alone among state courts deciding such a question, has determined that an irreversibly vegetative patient will remain a passive prisoner of medical technology—for Nancy, perhaps for the next 30 years.

Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration, affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require "clear and convincing" evidence of Nancy Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity.

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute, no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment. No third party's situation will be improved and no harm to others will be averted.

The only state interest asserted here is a general interest in the preservation of life. But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. Thus, the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's purview to be gained by superseding her decision.

Cruzan leaves many questions unanswered about the right to refuse treatment. Chief Justice Rehnquist's majority opinion assumes that there is a right to refuse treatment, and five justices—Justice O'Connor and the four dissenters—expressly recognize this right. Yet the Court never indicates the level of scrutiny to be used for this liberty interest. Also, the Court approves a state's requiring clear and convincing evidence that a person wanted treatment terminated before it is ended. But the Court does not consider whether a state may go even further in protecting life and require proof beyond a reasonable

doubt. Nor does the Court indicate what type of evidence, such as living wills, might be sufficient to meet this proof requirement.

RIGHT TO PHYSICIAN-ASSISTED DEATH

The Court has not returned to the issue of the right to refuse treatment since *Cruzan*, but it has considered a closely related question: whether there is a constitutional right to physician-assisted suicide.

WASHINGTON v. GLUCKSBERG

521 U.S. 702 (1997)

Chief Justice REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self-murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine.

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban. In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that the Washington law is, on its face, unconstitutional.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. That suicide remained a grievous, though nonfelonious, wrong is confirmed by

the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide.

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. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

[W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. 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.

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication." The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here. As the court below recognized, Washington's assisted-suicide ban implicates a number of state interests.

First, Washington has an "unqualified interest in the preservation of human life." The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. See New York Task Force (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. The State also has an interest in protecting the integrity and ethics of the medical profession. And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.

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."

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. Washington's ban on assisting suicide prevents such erosion.

This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," and concluded that the "risk of . . .

abuse is neither speculative nor distant." Washington, like most other States, reasonably ensures against this risk by banning, rather than regulating, assisting suicide.

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. 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 O'CONNOR, concurring. Justice GINSBURG concurs in the Court's judgments substantially for the reasons stated in this opinion. Justice BREYER joins this opinion except insofar as it joins the opinions of the Court.

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in Washington v. Glucksberg as whether the Due Process Clause of the Constitution protects a "right to commit suicide which itself includes a right to assistance in doing so," and concludes that our Nation's history, legal traditions, and practices do not support the existence of such a right. I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here.

The parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance."

In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.

Justice STEVENS, concurring in the judgments.

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide" in a democratic society. I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice.

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid "on its face," that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid.

As the Court's opinion demonstrates, Washington's statute prohibiting assisted suicide has a "plainly legitimate sweep." While that demonstration provides a sufficient justification for rejecting respondents' facial challenge, it does not mean that every application of the statute should or will be upheld.

History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. Much more than the State's paternalistic interest in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns is at stake. There is truth in John Donne's observation that "No man is an island." The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. Thus, I fully agree with the Court that the "liberty" protected by the Due Process Clause does not include a categorical "right to commit suicide which itself includes a right to assistance in doing so."

But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A State, like Washington, that has authorized the death penalty, and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.

Justice BREYER, concurring in the judgments.

I agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the Due Process Clause includes a right" of the sort that the respondents assert. I do not agree, however, with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.

The respondents here argue that one can find a "right to die with dignity" by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain. I do not believe, however, that this Court need or now should decide whether or a not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim and because, as Justice O'Connor points out, the laws before us do not force a dying person to undergo that kind of pain. Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be justified, regardless.

Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean not pain, but the need for sedation which can end in a coma. We are also told that there are many instances in which patients do not receive the palliative care that, in principle, is available, but that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do not include a prohibitive set of laws. This legal circumstance means that the state laws before us do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) as, by way of contrast, the state anticontraceptive laws did interfere with the central interest there at stake—by bringing the State's police powers to bear upon the marital bedroom.

Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases.

The companion case to Washington v. Glucksberg, decided the same day, was Vacco v. Quill. *Vacco* involved a challenge by terminally ill patients to the New York law that prohibited aiding or abetting a suicide. The U.S. Court of Appeals for the Second Circuit declared the law unconstitutional on equal protection grounds. The Second Circuit said that the New York law discriminated in that those on life support had a right to physician-

assisted suicide because *Cruzan* recognized a right to refuse treatment. But those not on life support had no such right and thus were discriminated against. The Supreme Court rejected this claim.

VACCO v. QUILL, 521 U.S. 793 (1997): Chief Justice REHNQUIST delivered the opinion of the Court.

In New York, as in most States, it is a crime to aid another to commit or attempt suicide, but patients may refuse even lifesaving medical treatment. The question presented by this case is whether New York's prohibition on assisting suicide therefore violates the Equal Protection Clause of the Fourteenth Amendment. We hold that it does not.

The Court of Appeals for the Second Circuit determined that, despite the assisted-suicide ban's apparent general applicability, "New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths," because "those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision creates no substantive rights. Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.

New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. They neither infringe fundamental rights nor involve suspect classifications. These laws are therefore entitled to a "strong presumption of validity." On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else or draw any distinctions between persons. Everyone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; no one is permitted to assist a suicide. Generally speaking, laws that apply evenhandedly to all "unquestionably comply" with the Equal Protection Clause.

The Court of Appeals, however, concluded that some terminally ill people—those who are on life-support systems—are treated differently from those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician-assisted suicide. This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational.

The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. Furthermore, a physician who withdraws, or honors a

patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. The law has long used actors' intent or purpose to distinguish between two acts that may have the same result.

Similarly, the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter. And "nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes." Thus, even as the States move to protect and promote patients' dignity at the end of life, they remain opposed to physician-assisted suicide.

New York's reasons for recognizing and acting on this distinction—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia—are discussed in greater detail in our opinion in *Glucksberg.* These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.

All nine justices voted to uphold the Washington and New York laws in Washington v. Glucksberg and Vacco v. Quill. However, it is notable that five justices—O'Connor, Stevens, Souter, Ginsburg, and Breyer—indicated that they may be willing to find these laws unconstitutional as applied in particular instances. None of the opinions was explicit about the circumstances in which laws prohibiting physician-assisted suicide would be declared unconstitutional as applied. But especially the opinions by Justices O'Connor and Breyer indicated that the state does not have an interest in prolonging suffering and that the result may be different in a situation where no alternative to eliminating suffering exists. The question, though, remains as to the circumstances, if any, in which the Court will find laws prohibiting physician-assisted suicide to be unconstitutional as applied.

Although there is no right to physican-assisted death under the United States Constitution, some state legislatures—such as Oregon and California—have created statutory rights. Also, some state courts have found such a right under state constitutions. *See, e.g.,* Baxter v. Montana, 224 P.3d 1211 (Mont. 2009).

F. CONSTITUTIONAL PROTECTION FOR SEXUAL ORIENTATION AND SEXUAL ACTIVITY

In Bowers v. Hardwick, 478 U.S. 186 (1986), the Supreme Court held that the right to privacy does not protect a right to engage in private consensual homosexual activity. In a five-to-four decision, the Court upheld a Georgia law that prohibited oral-genital or anal-genital contact. Although the statute applied to both heterosexual and homosexual activity, the Court's opinion focused exclusively on the constitutionality of states' prohibiting homosexual activity. The Court said that such a right did not exist because it was not supported by the Constitution's text, the framers' intent, or tradition.

In Lawrence v. Texas, the Court expressly overruled Bowers v. Hardwick and held that the right to privacy protects a right to engage in private consensual homosexual activity.[23] In reading this important decision, consider: What level of scrutiny is the majority using and does it matter? Does the decision have implications for whether there is a constitutional right to same-sex marriage or whether other laws regulating private consensual sexual activity (i.e., adultery laws or prostitution laws) are unconstitutional?

LAWRENCE v. TEXAS

539 U.S. 558 (2003)

Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and 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. In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person"; or "(B) the penetration of the genitals or the anus of another person with an object." §21.01(1).

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.*

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions.

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." 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 derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men.

Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults 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.

In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. 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.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing “ancient roots,” American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. 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 more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

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 of Southeastern Pa. v. Casey (1992).

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey (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. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for the petitioners and some amici contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

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. The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.

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.” 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." Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." We have consistently held, however, that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. This case shows, however, that prosecutions under §21.06 do occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers*, we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held

that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with" the Equal Protection Clause. Whether a sodomy law that is neutral both in effect and application, would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.

A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

"Liberty finds no refuge in a jurisprudence of doubt." Planned Parenthood of Southeastern Pa. 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.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in Bowers v. Hardwick. I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to stare decisis coauthored by three Members of today's majority in Planned Parenthood v. Casey. There, when stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it. Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as "intensely divisive" as the issue in *Roe*, is offered as a reason in favor of overruling it. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven unworkable."

Today's approach to stare decisis invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) if: (1) its foundations have been "eroded" by subsequent decisions, (2) it has been subject to "substantial and continuing" criticism, and (3) it has not induced "individual or societal reliance" that counsels against overturning. The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers.*

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "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."

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that

existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State.

II

Having decided that it need not adhere to stare decisis, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional. Texas Penal Code Ann. §21.06(a) (2003) 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.

Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right" under the Due Process Clause. The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. After discussing the history of antisodomy laws, the 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." This observation in no way casts into doubt the "definitive [historical] conclusion," on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting sodomy in general—regardless of whether it was performed by same-sex or opposite-sex couples: "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." Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the 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." The Court today agrees that

homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers* actually relied.

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." The key qualifier here is "acting in private"—since the Court admits that sodomy laws were enforced against consenting adults. I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880-1995. There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.

IV

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,"—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." The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." This effectively decrees the end of all morals legislation. 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.

V

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court, save Justice O'Connor, embraces: On its face §21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, §21.06 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. 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.

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. One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the 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. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. 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; that in some cases such "discrimination" is mandated by federal statute, see 10 U.S.C. §654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see Boy Scouts of America 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. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.

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 that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See Halpern v. Toronto (Ontario Ct. App. 2003).

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, what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so. The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice THOMAS, dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." Griswold v. Connecticut (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions."

G. CONSTITUTIONAL PROTECTION FOR CONTROL OVER INFORMATION

A basic aspect of privacy is the ability of people to control information about themselves. In an era of computer data banks, the existence and scope of this right is of obvious importance. Surprisingly, though, thus far the Court has rarely addressed this issue

directly. Whalen v. Roe is the primary Supreme Court case concerning constitutional protection for control over information.

WHALEN v. ROE

429 U.S. 589 (1977)

Justice STEVENS delivered the opinion of the Court.

The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

Many drugs have both legitimate and illegitimate uses. In response to a concern that such drugs were being diverted into unlawful channels, in 1970 the New York Legislature created a special commission to evaluate the State's drug-control laws. The commission found the existing laws deficient in several respects. There was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from over-prescribing, either by authorizing an excessive amount in one prescription or by giving one patient multiple prescriptions. In drafting new legislation to correct such defects, the commission consulted with enforcement officials in California and Illinois where central reporting systems were being used effectively.

The new New York statute classified potentially harmful drugs in five schedules. Drugs, such as heroin, which are highly abused and have no recognized medical use, are in Schedule I; they cannot be prescribed. Schedules II through V include drugs which have a progressively lower potential for abuse but also have a recognized medical use. Our concern is limited to Schedule II which includes the most dangerous of the legitimate drugs.

With an exception for emergencies, the Act requires that all prescriptions for Schedule II drugs be prepared by the physician in triplicate on an official form. The completed form identifies the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient. One copy of the form is retained by the physician, the second by the pharmacist, and the third is forwarded to the New York State Department of Health in Albany. A prescription made on an official form may not exceed a 30-day supply, and may not be refilled.

The District Court found that about 100,000 Schedule II prescription forms are delivered to a receiving room at the Department of Health in Albany each month. They are sorted, coded, and logged and then taken to another room where the data on the forms is recorded on magnetic tapes for processing by a computer. Thereafter, the forms are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute. The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-

line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine. At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer. Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse by specific patients.

State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

The New York statute challenged in this case represents a considered attempt to deal with such a problem. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse.

Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation. Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.

The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.

Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether intentional or unintentional or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

The Court also has upheld reporting requirements in other areas even though they pose some risk to privacy. For example, in California Bankers Association v. Schultz, 416 U.S. 21 (1974), the Court upheld the constitutionality of the Bank Secrecy Act of 1970, which required banks to maintain records of financial transactions and to report certain domestic and foreign transactions. The Court rejected claims based on the Fourth and Fifth Amendments and concluded that the law was constitutional because of the government's need to monitor financial transactions and to prevent fraudulent conduct.

In National Aeronautics and Space Administration v. Nelson, 562 U.S. 134 (2011), the Court upheld a requirement for background checks for employees of government contractors working with NASA. The Court said, "We assume, without deciding, that the Constitution protects a privacy right. We hold, however, that the challenged portions of

the Government's background check do not violate this right in the present case." Justice Scalia, joined by Justice Thomas, concurred in the judgment and declared, "A federal constitutional right to 'informational privacy' does not exist."

Thus, although there is a strong argument that the Constitution should be interpreted to protect a right to control information, there is thus far little support for such a right from the Supreme Court.

H. CONSTITUTIONAL PROTECTION FOR TRAVEL

The Supreme Court has held that there is a fundamental right to travel and to interstate migration within the United States. Therefore, laws that prohibit or burden travel within the United States must meet strict scrutiny. Although the text of the Constitution does not mention a right to travel, it long has been recognized by the Supreme Court. For example, in the *Passenger Cases*, Smith v. Turner 48 U.S. (7 How.) 283 (1849), the Supreme Court declared unconstitutional a state law imposing a tax on aliens arriving from foreign ports. Even the dissenting justices in the case acknowledged a basic right to interstate travel. Chief Justice Taney, in dissent, remarked, "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbours, is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain."

In Saenz v. Roe, in 1999, below, the Court comprehensively reviewed prior decisions concerning the right to travel.

SAENZ v. ROE

526 U.S. 489 (1999)

Justice STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence. The questions presented by this case are whether the 1992 statute was constitutional when it was enacted and, if not, whether an amendment to the Social Security Act enacted by Congress in 1996 affects that determination.

I

California is not only one of the largest, most populated, and most beautiful States in the Nation; it is also one of the most generous. Like all other States, California has participated in several welfare programs authorized by the Social Security Act and partially funded by the Federal Government. Its programs, however, provide a higher level of benefits and serve more needy citizens than those of most other States. In one year the most expensive of those programs, Aid to Families with Dependent Children (AFDC), which was replaced in 1996 with Temporary Assistance to Needy Families

(TANF), provided benefits for an average of 2,645,814 persons per month at an annual cost to the State of $2.9 billion. In California the cash benefit for a family of two—a mother and one child—is $456 a month, but in the neighboring State of Arizona, for example, it is only $275.

In 1992, in order to make a relatively modest reduction in its vast welfare budget, the California Legislature enacted §11450.03 of the state Welfare and Institutions Code. That section sought to change the California AFDC program by limiting new residents, for the first year they live in California, to the benefits they would have received in the State of their prior residence.

[II]

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us in Shapiro v. Thompson (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all."

In *Shapiro*, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." We squarely held that it was "constitutionally impermissible" for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State. We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause "unless shown to be necessary to promote a compelling governmental interest," and that no such showing had been made.

The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated in Edwards v. California (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in United States v. Guest (1966), which afforded protection to the "'right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.'" Given that §11450.03 imposed no obstacle to respondents' entry into California, we think the State is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement. For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution. The right of "free

ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, §2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[24] Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."

What is at issue in this case, then, is a third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth 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; . . ." Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases* (1872), it has always been common ground that this Clause protects the third component of the right to travel.

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, but it is surely no less strict.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

It is undisputed that respondents and the members of the class that they represent are citizens of California and that their need for welfare benefits is unrelated to the length of time that they have resided in California. We thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned. Moreover, because whatever benefits they receive will

be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile.

The classifications challenged in this case—and there are many—are defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

Disavowing any desire to fence out the indigent, California has instead advanced an entirely fiscal justification for its multitiered scheme. The enforcement of §11450.03 will save the State approximately $10.9 million a year. The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result. But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." It is equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence. Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens.

The question that remains is whether congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act somehow resuscitates the constitutionality of §11450.03. That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.

Chief Justice REHNQUIST, with whom Justice THOMAS joins, dissenting.

Much of the Court's opinion is unremarkable and sound. The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens. The state law in Edwards v. California (1941), which prohibited the transport of any indigent person into California, was a classic barrier to travel or migration and the Court rightly struck it down. Indeed, for most of this country's history, what the Court today calls the first "component" of the right to travel, was the entirety of this right.

But I cannot see how the right to become a citizen of another State is a necessary "component" of the right to travel, or why the Court tries to marry these separate and distinct rights. A person is no longer "traveling" in any sense of the word when he

finishes his journey to a State which he plans to make his home. Indeed, under the Court's logic, the protections of the Privileges or Immunities Clause recognized in this case come into play only when an individual stops traveling with the intent to remain and become a citizen of a new State. The right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a "component" of the other.

In unearthing from its tomb the right to become a state citizen and to be treated equally in the new State of residence, however, the Court ignores a State's need to assure that only persons who establish a bona fide residence receive the benefits provided to current residents of the State. While the physical presence element of a bona fide residence is easy to police, the subjective intent element is not. It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain. Hence, States employ objective criteria such as durational residence requirements to test a new resident's resolve to remain before these new citizens can enjoy certain in-state benefits. Recognizing the practical appeal of such criteria, this Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities. Starns v. Malkerson (1971) (upholding 1-year residence requirement for in-state tuition). The Court has declared: "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but have come there solely for educational purposes, cannot take advantage of the in-state rates." Vlandis v. Kline (1973). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts, see Sosna v. Iowa (1975), and in upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, see Rosario v. Rockefeller (1973).

If States can require individuals to reside in-state for a year before exercising the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections that all other state citizens enjoy, then States may surely do the same for welfare benefits. Indeed, there is no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university. The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California's standard of living and higher education system make both subsidies quite attractive.

I therefore believe that the durational residence requirement challenged here is a permissible exercise of the State's power to "assur[e] that services provided for its residents are enjoyed only by residents." The 1-year period established in §11450.03 is the same period this Court approved in *Starns* and *Sosna.* The requirement does not deprive welfare recipients of all benefits; indeed, the limitation has no effect whatsoever on a recipient's ability to enjoy the full 5-year period of welfare eligibility; to enjoy the full range of employment, training, and accompanying supportive services; or to take full advantage of health care benefits under Medicaid. This waiting period does not preclude new residents from all cash payments, but merely limits them to what they received in their prior State of residence.

Saenz reviews the major prior decisions concerning the right to travel. For example, in Edwards v. California, 314 U.S. 160 (1941), the Court invalidated a California law that

made it a crime to bring a nonresident into the state knowing the individual to be "an indigent person." The majority opinion, written by Justice Byrne, declared the law unconstitutional as violating the Commerce Clause and did not address the right to travel. However, in concurring opinions, Justices Douglas, Black, Murphy, and Jackson argued that the right to travel is a fundamental right protected under the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Douglas declared, "[T]he right of persons to move freely from State to State . . . is so fundamental. . . . The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."

The Supreme Court has articulated and applied the right to travel primarily in evaluating laws that impose durational residency requirements. A durational residency requirement is where a person must live in the jurisdiction for a specified amount of time in order to receive a benefit. Prominent examples involve waiting periods required for receipt of welfare benefits, voting, and divorces. The Supreme Court has recognized that durational residency requirements discourage interstate travel, and especially migration. The Court, therefore, has said that strict scrutiny should be applied in this area.

The seminal decision was Shapiro v. Thompson, 394 U.S. 618 (1969), which declared unconstitutional laws that imposed a one-year residency requirement in the state as a prerequisite for eligibility for welfare. The Court said that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause." The Court reviewed the justifications proffered by the states for the waiting period and found that none was sufficient to meet strict scrutiny.

In subsequent cases, the Court applied *Shapiro* to invalidate other durational residency requirements. For instance, in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court declared unconstitutional a government rule that required a year's residency in the county as condition to receiving nonemergency hospitalization or medical care at the county's expense. The Court reviewed the prior decisions in this area and said that they "stand for the proposition that a classification which operates to penalize those persons . . . who have exercised their constitutional right of interstate migration, must be justified by a compelling state interest."

The Supreme Court followed this reasoning in invalidating and limiting the length of durational residency requirements for voting. In Dunn v. Blumstein, 405 U.S. 330 (1972), the Court declared unconstitutional a state law that created a one-year residency requirement for voting eligibility. Vanderbilt law professor James Blumstein challenged Tennessee's waiting period in order to register to vote. The Court noted that the state law drew a distinction among residents solely on the basis of their recent migration and travel.

The Court said that it was thus clear that "the durational residence requirement directly impinges on the exercise of a . . . fundamental personal right, the right to travel." The Court explained that "it is clear that the freedom to travel includes the 'freedom to enter and abide in any State in the Union.' Obviously durational residence laws single out the

class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly."

The Court rejected each of the state's justifications and invalidated the law. For example, the state said that the durational residency requirement was justified by the state's desire to have knowledgeable voters. The Court ruled that a state cannot exclude residents from voting based on an assessment of their knowledge, sophistication with local issues, or how they might vote.

Subsequently, the Supreme Court has qualified Dunn v. Blumstein and has allowed some residency requirements for voting. The Court has permitted durational residency requirements of up to 50 days for voting to give the government time to check election rolls, prevent fraud, and administer the electoral system.[25]

One area where the Court has upheld durational residency requirements is for divorces within a state. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court upheld the constitutionality of a state law that required one year of residency in the state before a person could obtain a divorce. The Court distinguished earlier cases invalidating durational residency requirements for receipt of government benefits, such as *Shapiro* and *Maricopa County.* The Court said, "But none of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed. What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or record-keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals." The Court felt that the state's durational residency requirement was "of a different stripe." The Court said that the difference was that a person moving into the state "would eventually qualify" for eligibility for divorce and "could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time."

RESTRICTIONS ON FOREIGN TRAVEL

However, the Supreme Court has held that there is not a fundamental right to international travel and that therefore only a rational basis test will be used in evaluating restrictions on foreign travel. The Supreme Court's initial decisions in this area had broad dicta that suggested such a right, but more recent cases have clearly held that the Court does not recognize a fundamental right to foreign travel.

For example, in Califano v. Aznavorian, 439 U.S. 170 (1978), the Court upheld a provision of the Social Security Act that caused a person to lose Supplemental Security Income benefits for any month during all of which the individual was out of the United States and until the person had been back in the country for 30 consecutive days. The Court expressly distinguished the right to interstate travel from the right to foreign travel; only the former is deemed fundamental. The Court stated, "The constitutional right of interstate travel is virtually unqualified. By contrast, the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. . . . Thus, legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws

that penalize the right of interstate travel, such as durational residency requirements imposed by the States."

The use of the rational basis test for restrictions on foreign travel was reaffirmed in later cases. In Haig v. Agee, 453 U.S. 280 (1981), the Court upheld the authority of the Secretary of State to revoke the passport of a former CIA agent who had threatened to identify CIA officers and agents and to take measures to drive them out of countries where they were operating. The Court emphasized the ability of the government to regulate international travel to further its foreign policy objectives. Chief Justice Burger, writing for the Court, said, "Revocation of a passport undeniably curtails travel, but the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation. The Court has made it plain that the freedom to travel outside the United States must be distinguished from the right to travel within the United States."

Similarly, in Regan v. Wald, 468 U.S. 222 (1984), the Court used the rational basis test to uphold a federal regulation that prevented travel to Cuba. Justice Rehnquist, writing for the Court, said, "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'"

I. THE RIGHT TO VOTE

1. The Right to Vote as a Fundamental Right

Many of the amendments to the Constitution concern the right to vote. The Fifteenth Amendment says, "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 Nineteenth Amendment, adopted in 1920, extended the right to vote to women and says 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 sex."

The Twenty-Fourth Amendment, ratified in 1964, prohibits poll taxes in elections for federal office. Specifically, it provides, "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."

The Twenty-Sixth Amendment, adopted in 1971, extends the right to vote to all citizens who are 18 years of age or older. It says, "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

In addition to these textual provisions, the Supreme Court repeatedly has declared that the right to vote is a fundamental right protected under equal protection.[26] The right to vote is regarded as fundamental because it is essential in a democratic society; it is obviously through voting that the people choose their government and hold it

accountable. The Court has explained that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[27] Hence, "any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[28]

Indeed, the Court long has said that the right to vote is a "fundamental political right" because it is "preservative of all rights."[29] Voting is itself a form of expression, but it also is the way in which people choose a government that will safeguard all of their liberties and interests. As the Court observed, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[30]

Thus, it is clearly established that laws infringing the right to vote must meet strict scrutiny. The Court has explained that "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[31]

Two major issues concerning the right to vote are discussed below: laws that deny some citizens the right to vote and laws that dilute the voting power of some citizens. The Court has said that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[32] Other issues concerning voting are discussed in other chapters. For example, race discrimination in election systems is discussed in connection with equal protection in Chapter 7. Issues related to government regulation of political parties and the political process are discussed in Chapter 9.

2. Restrictions on the Ability to Vote

Laws that deny or limit the ability of citizens to vote must meet strict scrutiny. For example, as described below, the Supreme Court has used strict scrutiny in evaluating poll taxes, property ownership requirements for voting, and durational residency requirements. However, there are some areas where the Court did not use strict scrutiny and upheld restrictions on voting: literacy tests, laws preventing those convicted of felonies from voting, and a requirement for photo identification for voting. Each of these areas is discussed in turn.

POLL TAXES

Poll taxes—the requirement that people pay a fee in order to vote—likely will keep some citizens from voting. The Twenty-Fourth Amendment prohibits poll taxes in elections for federal offices. Additionally, the Supreme Court in Harper v. Virginia State Board of Elections held that poll taxes are unconstitutional as a denial of equal protection for all other elections.

HARPER v. VIRGINIA STATE BOARD OF ELECTIONS

Justice DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax. Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the State 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials "exclusively in aid of the public free schools" and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as a precondition for voting.

While the right to vote in federal elections is conferred by Art. I, §2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

We conclude 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. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.

We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. Those principles apply here. For to

repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

PROPERTY OWNERSHIP REQUIREMENTS

Laws requiring property ownership as a requirement for voting seem to run afoul of *Harper*'s forceful declaration that wealth cannot be a basis for denying individuals the ability to vote. Yet the Court's record in dealing with such property ownership requirements is mixed. Kramer v. Union Free School District seems to broadly invalidate property ownership requirements for voting, but later cases have approved them in very narrow circumstances.

KRAMER v. UNION FREE SCHOOL DISTRICT

395 U.S. 621 (1969)

Chief Justice WARREN delivered the opinion of the Court.

In this case we are called on to determine whether §2012 of the New York Education Law is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that §2012 denied him equal protection of the laws in violation of the Fourteenth Amendment.

Appellant is a 31-year-old college-educated stockbroker who lives in his parents' home in the Union Free School District No. 15, a district to which §2012 applies. He is a citizen of the United States and has voted in federal and state elections since 1959. However, since he has no children and neither owns nor leases taxable real property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful.

Besides appellant and others who similarly live in their parents' homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to "members of the community of interest"—those "primarily interested in such elections." Second, appellees urge that the State may reasonably and permissibly conclude that "property taxpayers" (including

lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those "primarily interested" in school affairs.

We do not understand appellees to argue that the State is attempting to limit the franchise to those "subjectively concerned" about school matters. Rather, they appear to argue that the State's legitimate interest is in restricting a voice in school matters to those "directly affected" by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are "directly" affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a "direct" stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those "primarily interested" in school affairs because "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system." We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited. For, assuming, arguendo, that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," close scrutiny of the §2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.

Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in §2012 permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents—other than to argue that the §2012 classifications include those "whom the State could understandably deem to be the most intimately interested in actions taken by the school board." But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the §2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of §2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

Justice STEWART, with whom Justice BLACK, and Justice HARLAN join, dissenting.

In Lassiter v. Northampton County Election Bd. this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. Writing for a unanimous Court, Mr. Justice Douglas said: "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns."

Believing that the appellant in this case is not the victim of any "discrimination which the Constitution condemns," I would affirm the judgment of the District Court. Although at times variously phrased, the traditional test of a statute's validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." It was under just such a test that the literacy requirement involved in *Lassiter* was upheld. The premise of our decision in that case was that a State may constitutionally impose upon its citizens voting requirements reasonably "designed to promote intelligent use of the ballot." A similar premise underlies the proposition, consistently endorsed by this Court, that a State may exclude nonresidents from participation in its elections. Such residence requirements, designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon, are entirely permissible exercises of state authority.

Thus judged, the statutory classification involved here seems to me clearly to be valid. New York has made the judgment that local educational policy is best left to those persons who have certain direct and definable interests in that policy: those who are either immediately involved as parents of school children or who, as owners or lessees of taxable property are burdened with the local cost of funding school district operations. True, persons outside those classes may be genuinely interested in the conduct of a school district's business—just as commuters from New Jersey may be genuinely interested in the outcome of a New York City election. But unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 States, I see no way to justify the conclusion that the legislative classification involved here is not rationally related to a legitimate legislative purpose. "There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them."

In any event, it seems to me that under any equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. [I]t must be emphasized—despite the Court's undifferentiated references to what it terms "the franchise"—that we are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.

However, *Kramer* does not mean that all property ownership requirements for voting are invalid. In Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719

(1973), the Supreme Court upheld state laws that limited voting in water storage district elections to property owners and that apportioned votes according to assessed valuation of land within the districts. The Court emphasized that landowners had a far greater interest in the outcome of the election than other citizens. The Court explained, "Landowners as a class were to bear the entire burden of the district's costs, and the State could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for its operation."[33] The Court also noted that although the water district has some governmental authority, it does not provide general public services ordinarily attributed to a governing body. Thus, it concluded "that nothing in the Equal Protection Clause precluded California from limiting the voting for directors of appellee district by totally excluding those who merely reside within the district."

The Court followed and applied *Salyer* in Ball v. James, 451 U.S. 355 (1981). *Ball*, like *Salyer*, involved a water district election. In *Ball*, votes were allocated based on property ownership: The basic rule was one acre, one vote. Unlike in *Salyer*, decisions by the governing body in *Ball* had a wide impact. The district was a major supplier of hydroelectric power, and about 40 percent of its water went to urban areas for nonagricultural uses.

Nonetheless, the Court found that the property ownership requirement for voting was justified. The Court explained that only the landowners were subject to the acreage-based taxing power of the water district. The Court did not deny that others had an interest in and were affected by the decisions of the district. But the Court said that "[t]he *Salyer* opinion did not say that the selected class of voters for a special public entity must be the only parties at all affected by the operation of the entity, or that their entire economic well-being must depend on that entity. Rather, the question was whether the effect of the entity's operations on them was disproportionately greater than the effect on those seeking the vote."

LITERACY TESTS

The Supreme Court has concluded that literacy tests are constitutionally permissible as a qualification for voting, although they have been outlawed by federal statutes. The Court first confronted literacy tests in Guinn v. United States, 238 U.S. 347 (1915), and the Court upheld the ability of states to require passing a literacy test as a condition for voting. However, in *Guinn* the Court invalidated a "grandfather clause" that exempted from the literacy test anyone, or their lineal descendants, who could have voted on January 1, 1866. Obviously, the effect was to deny the vote to blacks who were ineligible to vote at the end of the Civil War. But apart from the grandfather clause, the Court was explicit that literacy tests are permissible: "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted."

More recently, in 1959 in Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), the Court upheld a North Carolina statute that conditioned voting eligibility on a person's ability to read and write any section of the Constitution in the English language. Justice Douglas, writing for the Court, emphasized that "[t]he States have long been held to have broad powers to determine the conditions under which the right of

suffrage may be exercised, absent of course discrimination which the Constitution condemns."

Thus the Court concluded that literacy tests may be used because the ability to read and write is relevant to the ability to exercise the franchise intelligently. Justice Douglas wrote, "The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State may conclude that only those who are literate should exercise the franchise."

However, although literacy tests are constitutional, they have been outlawed by federal statute. Congress initially limited literacy tests and then amended the Voting Rights Act to completely prohibit them.[34] The Supreme Court upheld these laws as a valid exercise of Congress's powers under §5 of the Fourteenth Amendment even though they had the effect of overturning an earlier Court decision.[35]

PRISONERS' AND CONVICTED CRIMINALS' RIGHT TO VOTE

Many cases have concerned the ability of the state to restrict voting by those held in prison or those convicted of crimes. To summarize the cases described below, states cannot deny the right to vote to those being held waiting for trial and, in fact, must provide them absentee ballots if they have no other way of voting. However, once a person has been convicted of a felony, a state may permanently disenfranchise the individual. But at least where there was evidence of a racially discriminatory purpose behind the law, a state was prevented from permanently denying the right to vote to those convicted of crimes involving moral turpitude.

In a series of cases, the Court considered the duty of the government to provide absentee ballots to those held in jail while waiting for trial. In O'Brien v. Skinner, 414 U.S. 524 (1974), the Court held that the government must provide absentee ballots to jail inmates where it is proven that they have no other way of voting. In *O'Brien*, the record demonstrated that the state refused to provide jail inmates absentee ballots and did not create polling places at jails or transport inmates outside to vote. Actually, the state law was even more irrational: Inmates being held outside their county of residence could receive an absentee ballot, but those in jail within their home county could not obtain an absentee ballot.

However, once a person has been convicted of a felony, a state may permanently deny the individual the right to vote. In Richardson v. Ramirez, 418 U.S. 24 (1974), the Court relied on the language of §2 of the Fourteenth Amendment to uphold the ability of states to disenfranchise felons and ex-felons. Section 2, in part, says that "[r]epresentatives 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." However, the provision says that representation shall be decreased if a state denies the right to vote to any male citizens, 21 years of age or older, "except for participation in rebellion, or other crimes." In other words, the provision says that there would be no

penalty in terms of representation in the House of Representatives if a state denied the right to vote to those who participated in rebellion or other crimes.

The Court, in an opinion by Justice Rehnquist, reviewed the legislative history of this provision and also noted that at the time the Fourteenth Amendment was ratified, "29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." The Court also relied on earlier decisions, from the late nineteenth century, that denied bigamists and polygamists the right to vote in territorial Utah and Idaho. The Court concluded that a state may deny the right to vote to those convicted of felonies, even if they had completed their sentences and paroles.

However, in Hunter v. Underwood, 471 U.S. 222 (1985), the Court invalidated an Alabama law that denied the right to vote to those who had been convicted of crimes involving moral turpitude. A federal district court found that the provision had been adopted with the purpose of disenfranchising blacks and that it had that effect. The Supreme Court accepted these findings and said, "Without deciding whether [the law] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."

REQUIREMENT FOR PHOTO IDENTIFICATION FOR VOTING

In Crawford v. Marion County Election Board, the Supreme Court considered the constitutionality of a requirement for photo identification for voting, an issue that remains controversial. There was no majority opinion for the Court as there was a three-to-three-to-three split among the justices, with six voting to allow the regulation. In reading the case, it is important to focus on what test each group of justices would use. Also, it is important to consider whether this case can be reconciled with other decisions concerning the right to vote, such as those striking down poll taxes and property ownership requirements for voting. It is important to emphasize that *Crawford* involved a facial challenge to a requirement for photo identification for voting. As-applied challenges have recently succeeded in a number of states, but have not yet been considered by the Supreme Court.

CRAWFORD v. MARION COUNTY ELECTION BOARD

553 U.S. 181 (2008)

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.

Referred to as either the "Voter ID Law," or SEA 483, the statute applies to in-person voting at both primary and general elections.

The requirement does not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. 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 county 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.

I

In Harper v. Virginia Bd. 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." We used the term "invidiously discriminate" to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose "reasonable residence restrictions on the availability of the ballot," it "may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services." 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.

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.

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 provisions of the Indiana Criminal Code punishing such conduct as a felony provide 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 by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

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. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

III

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification. A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character.

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. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. 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. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. 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; Judge Barker found petitioners' expert's report to be "utterly incredible and unreliable." Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court. 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. 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." 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. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

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."

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

The lead opinion assumes petitioners' premise that the voter-identification law "may have imposed a special burden on" some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.

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, nondiscriminatory 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.

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. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

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.

The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.

The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not "even represent a significant increase over the usual burdens of voting." And the State's interests are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana's "Voter ID Law" threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, and a significant percentage of those individuals are likely to be deterred from voting. The statute is unconstitutional under the balancing standard of Burdick v. Takushi (1992): 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 from the Court's judgment sustaining the statute.

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.

Given the legitimacy of interests on both sides, we have avoided pre-set 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), which is demanded of anyone applying for a driver's license or nondriver photo identification. 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, witness the fact that the BMV has far fewer license branches in each county than there are voting precincts.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably serious for many of the individuals who lack photo identification, and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all, and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties. State officials recognize the effect that travel costs can

have on voter turnout, as in Marion County, for example, where efforts have been made to "establis[h] most polling places in locations even more convenient than the statutory minimum," in order to "provid[e] for neighborhood voting." Although making voters travel farther than what is convenient for most and possible for some does not amount to a "severe" burden under *Burdick*, that is no reason to ignore the burden altogether. It translates into an obvious economic cost (whether in work time lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

For those voters who can afford the roundtrip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present "'a birth certificate, a certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.'" As the lead opinion says, the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U.S. citizenship by birth. The total fees for a passport, moreover, are up to about $100. So 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

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers "indigent" as well as those with religious objections to being photographed, and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief.

The law allows these voters who lack the necessary ID to sign the poll book and cast a provisional ballot. As the lead opinion recognizes, though, that is only the first step; to 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). Unlike the trip to the BMV (which, assuming things go smoothly, needs to be made only once every four years for renewal of nondriver photo identification), this one must be taken every time a poor person or religious objector wishes to vote, because the State does not allow an affidavit to count in successive elections. And unlike the trip to the BMV (which at least has a handful of license branches in the more populous counties), a county has only one county seat. 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 of this suggests that provisional ballots do not obviate the burdens of getting photo identification. And even if that were not so, the provisional-ballot option would be

inadequate for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled).

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. The District Court made that estimate by comparing BMV records reproduced in petitioners' statistician's report with U.S. Census Bureau figures for Indiana's voting-age population in 2004, and the State does not argue that these raw data are unreliable.

So a fair reading of the data supports the District Court's finding that around 43,000 Indiana residents lack the needed identification, and will bear the burdens the law imposes. 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.

The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically. The Voter ID Law places hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting.[36]

Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim. While of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt, he does enough to show that serious burdens are likely.

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 of "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public

confidence in the integrity of the electoral process. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

The lead opinion's discussion of the State's reasons begins with the State's asserted interests in "election modernization," and in combating voter fraud. Although these are given separate headings, any line drawn between them is unconvincing; as I understand it, the "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. The photo ID requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana); of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot-stuffing, ballot miscounting, voter intimidation, or any other type of corruption on the part of officials administering elections.

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State.

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; there is reason to think that "impersonation of voters is . . . the most likely type of fraud to be discovered." This is in part because an individual who impersonates another at the polls commits his fraud in the open, under the scrutiny of local poll workers who may well recognize a fraudulent voter when they hear who he claims to be.

The relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by "organized groups such as campaigns or political parties" rather than by individuals acting alone. It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few who may commit it. If an imposter gets caught, he is subject to severe criminal penalties.

In sum, fraud by individuals acting alone, however difficult to detect, is unlikely. And while there may be greater incentives for organized groups to engage in broad-gauged in-person voter impersonation fraud, it is also far more difficult to conceal larger enterprises of this sort. The State's argument about the difficulty of detecting the fraud lacks real force.

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 post-election 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, similarly 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.

Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement has been shown to outweigh the serious burdens it imposes on the right to vote.

The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old. I would vacate the judgment of the Seventh Circuit, and remand for further proceedings.

3. Dilution of the Right to Vote

Prior to the 1960s, many state legislatures were badly malapportioned. One district for the legislature often would be far more populous than another district for the same body. Likewise, districts within a state for electing members of the House of Representatives often were significantly malapportioned. Malapportionment in many areas was a result of

population shifts to urban areas. Districts often were not redrawn after urban migration, causing cities to be underrepresented compared with more rural areas. Legislators who benefited from the malapportionment were unlikely to change the districting.

Initially, the Supreme Court ruled that challenges to malapportionment posed a nonjusticiable political question.[37] However, in Baker v. Carr, 369 U.S. 186 (1962), the Court concluded that equal protection challenges to malapportionment were justiciable.[38] Soon after, the Court articulated the rule of one person, one vote; that is, for any legislative body, all districts must be about the same in population size.

The first case to announce this principle was Gray v. Sanders, 372 U.S. 368 (1963). *Gray* involved a challenge to the Georgia system of selecting representatives for the Georgia House of the General Assembly on a county basis. An inequality resulted because counties varied widely in population size. Justice Douglas, writing for the Court, explained why this is unconstitutional: "How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, wherever their occupation, whatever their income, and whatever their home may be in that geographic unit. This is required by the Equal Protection Clause of the Fourteenth Amendment."

The Court's most famous and most elaborate discussion of the one-person, one-vote rule was in Reynolds v. Sims.

REYNOLDS v. SIMS

377 U.S. 533 (1964)

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied "equal suffrage in free and equal elections . . . and the equal protection of the laws" in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution.

On July 21, 1962, the District Court held that the inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been "generally conceded" by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. Under the existing provisions, applying 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance

ratios of up to about 41-to-l existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives. With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county, Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people.

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people, or as a result of a constitutional convention convened after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.

Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids "sophisticated as well as simpleminded modes of discrimination."

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further. However, one of the proposed plans, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation followed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population.

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union." But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government.

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

Justice HARLAN, dissenting.

In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate. These decisions have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. I must register my protest.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate—I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before Baker v. Carr made an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of "developing" constitutionalism. It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, §4), the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court. So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of action, because what has been alleged or proved shows no violation of any constitutional right.

The Court followed this rationale in Wesberry v. Sanders, 376 U.S. 1 (1964), and declared unconstitutional districts for the House of Representatives where some districts had twice as many people as others. Specifically, one district had 823,680 people, compared with another district that had 394,312. The Court, in an opinion by Justice Black, discussed, at length, the framers' theory of representative democracy and again concluded that the rule is "one person, one vote." The Court concluded: "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal of the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."

The Court concluded by powerfully declaring: ". . . No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring

our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."

In a companion case to *Reynolds*, Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964), the Court said that it was irrelevant that voters, by initiative, had approved the malapportionment. The Court explained that one person, one vote is a constitutional mandate and that voter approval does not justify a violation, any more than voter approval would permit the violation of any other constitutional right. The Court observed that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."

The principle of one person, one vote has been extended to all forms of local governments. In Avery v. Midland County, 390 U.S. 474, 485 (1968), the Court said that one person, one vote applied to county commissioners who had "general government powers over the entire geographic area served by the body." In Hadley v. Junior College District, 397 U.S. 50 (1970), the principle was applied to an elected body with limited governing authority: a junior college district. The elected body had the authority to tax, to employ teachers, and to manage the educational program. The Court rejected earlier attempts to distinguish legislative officials from administrative ones. The Court said that all elected officials must be selected in a manner that avoids vote dilution. The Court stated, "[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, [equal protection] requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionately equal numbers of officials."

The rule of one person, one vote does not require mathematical exactness in the size of districts, but only relatively small deviations are tolerated. More latitude is given to deviations in districting for state and local offices than for districts for the U.S. House of Representatives. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court invalidated districting for the House of Representatives where the "most populous district was 3.13% above the mathematical ideal, and the least populous was 2.84% below." The Court emphasized that the government must "make a good-faith effort to achieve precise mathematical equality." In White v. Weiser, 412 U.S. 783 (1973), the Court declared uncon stitutional even smaller deviations in districts for the House of Representatives. The Court repeatedly has emphasized that, especially with regard to elections for federal offices, any deviation must be justified. For example, in Karcher v. Daggett, 462 U.S. 725 (1983), the Court declared unconstitutional districting for the House of Representatives where the deviation between them was 0.7 percent. This deviation was impermissible because the state could offer no justification as to why it was needed.

The Court, though, has allowed more deviation in districts for electing state and local officials. In Mahan v. Howell, 410 U.S. 315 (1973), the Court expressly said that "broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting." For example, in *Mahan*, the Court allowed deviations where the overrepresented districts exceeded the ideal by 6.8 percent and the underrepresented districts were 9.6 percent away from the target. In White v. Regester, 412 U.S. 755 (1973), the Court allowed an apportionment scheme where the total variation between

the largest and the smallest district was 9.9 percent, though the Court indicated that this was near the maximum allowable deviation.[39] In Harris v. Arizona Independent Districting Commission, 136 S. Ct. 1301 (2016), the Court reaffirmed that districts for state and local elections are presumptively valid so long as the deviations are less than 10 percent. The Court declared: "[I]n a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the 'legitimate considerations.' Given the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases."

There is no doubt that the reapportionment decisions have had an enormous effect on American government. Although they were extremely controversial in the 1960s, they are now seen as a paradigm of the judiciary acting to perfect the political process and reinforce democracy.[40] Reapportionment was very unlikely to occur without judicial action because officeholders were not likely to give up their seats voluntarily. The decisions dramatically changed the composition of state legislatures and thus undoubtedly affected the laws adopted.

Yet some still criticize the cases as being excessive judicial activism because there was no authority in the text or the framers' intent for the rule of one person, one vote.[41] The critics see the decisions as improper judicial interference, unsupported by the text of the Constitution or the framers' intent, with the political process.

"One-person one-vote" has been understood to mean that for any elected body with districts, all districts must be about the same in population. But in Evenwel v. Abbott, the Court considered the argument that districting must be based on the number of eligible voters, so that all voters have the same chance for equal influence, and not based on total population. The Court rejected this argument and held that total population is a permissible basis for drawing election districts. Notice, though, that the Court did not reach the question of whether it also would be permissible to use eligible voters in drawing election districts.

EVENWEL v. ABBOTT

136 S. Ct. 1120 (2016)

Justice GINSBURG delivered the opinion of the Court.

Texas, like all other States, draws its legislative districts on the basis of total population. Plaintiffs-appellants are Texas voters; they challenge this uniform method of districting on the ground that it produces unequal districts when measured by voter-eligible population. Voter-eligible population, not total population, they urge, must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts. We hold, based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population.

I

A

In Wesberry v. Sanders (1964), the Court invalidated Georgia's malapportioned congressional map, under which the population of one congressional district was "two to three times" larger than the population of the others. Relying on Article I, §2, of the Constitution, the Court required that congressional districts be drawn with equal populations. Later that same Term, in Reynolds v. Sims, (1964), the Court upheld an equal protection challenge to Alabama's malapportioned state-legislative maps. "[T]he Equal Protection Clause," the Court concluded, "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Wesberry* and *Reynolds* together instructed that jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment.

In contrast to repeated disputes over the permissibility of deviating from perfect population equality, little controversy has centered on the population base jurisdictions must equalize. On rare occasions, jurisdictions have relied on the registered-voter or voter-eligible populations of districts. See Burns v. Richardson (1966) (holding Hawaii could use a registered-voter population base because of "Hawaii's special population problems"—in particular, its substantial temporary military population). But, in the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. Today, all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way.

B

Appellants challenge that consensus. After the 2010 census, Texas redrew its State Senate districts using a total-population baseline. Appellants Sue Evenwel and Edward Pfenninger live in Texas Senate districts (one and four, respectively) with particularly large eligible- and registered-voter populations. Contending that basing apportionment on total population dilutes their votes in relation to voters in other Senate districts, in violation of the one-person, one-vote principle of the Equal Protection Clause, appellants filed suit in the U.S. District Court for the Western District of Texas.

II

The parties and the United States advance different positions in this case. As they did before the District Court, appellants insist that the Equal Protection Clause requires jurisdictions to draw state and local legislative districts with equal voter-eligible populations, thus protecting "voter equality," *i.e.,* "the right of eligible voters to an equal vote." To comply with their proposed rule, appellants suggest, jurisdictions should design districts based on citizen-voting-age-population (CVAP) data from the Census Bureau's American Community Survey (ACS), an annual statistical sample of the U.S. population. Texas responds that jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory.

In agreement with Texas and the United States, we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and

practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.

A

We begin with constitutional history. At the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States? The Framers' solution, now known as the Great Compromise, was to provide each State the same number of seats in the Senate, and to allocate House seats based on States' total populations. In other words, the basis of *representation* in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives.

When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Concerned that Southern States would not willingly enfranchise freed slaves, and aware that "a slave's freedom could swell his state's population for purposes of representation in the House by one person, rather than only three-fifths," the Framers of the Fourteenth Amendment considered at length the possibility of allocating House seats to States on the basis of voter population.

The product of these debates was §2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base. See U.S. Const., Amdt. 14, §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.").

Appellants ask us to find in the Fourteenth Amendment's Equal Protection Clause a rule inconsistent with this "theory of the Constitution." But, as the Court recognized in *Wesberry,* this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States. "The debates at the [Constitutional] Convention," the Court explained, "make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people,' they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants." It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.

B

Consistent with constitutional history, this Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. Quoting language from those decisions that, in appellants' view, supports the principle of equal voting power—and emphasizing the phrase "one-person, one-vote"— appellants contend that the Court had in mind, and constantly meant, that States should equalize the voter-eligible population of districts.

[F]rom *Reynolds* on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating

impermissibly from perfect population equality. See Brief for Appellees 29-31 (collecting cases brought under the Equal Protection Clause). Appellants point to no instance in which the Court has determined the permissibility of deviation based on eligible- or registered-voter data. It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule. More likely, we think, the Court has always assumed the permissibility of drawing districts to equalize total population.

C

What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries. Appellants have shown no reason for the Court to disturb this longstanding use of total population. As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.

In sum, the rule appellants urge has no mooring in the Equal Protection Clause. The Texas Senate map, we therefore conclude, complies with the requirements of the one-person, one-vote principle. Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.

Justice THOMAS, concurring in the judgment.

I write separately because this Court has never provided a sound basis for the one-person, one-vote principle. For 50 years, the Court has struggled to define what right that principle protects. Many of our precedents suggest that it protects the right of eligible voters to cast votes that receive equal weight. Despite that frequent explanation, our precedents often conclude that the Equal Protection Clause is satisfied when all individuals within a district—voters or not—have an equal share of representation. The majority today concedes that our cases have not produced a clear answer on this point.

In my view, the majority has failed to provide a sound basis for the one-person, one-vote principle because no such basis exists. The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.

This inconsistency (if not opacity) is not merely a consequence of the Court's equivocal statements on one person, one vote. The problem is more fundamental. There is simply no way to make a principled choice between interpreting one person, one vote as protecting eligible voters or as protecting total inhabitants within a State. That is because, though those theories are noble, the Constitution does not make either of them the exclusive means of apportionment for state and local representatives. In guaranteeing to the States a "Republican Form of Government," Art. IV, §4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation. The Constitution instead reserves these matters to the people. The majority's attempt today to divine a single "'theory of the Constitution'"—apportionment based on representation—rests on a flawed reading of history and wrongly picks one side of a debate that the Framers did not resolve in the Constitution.

The Court's attempt to impose its political theory upon the States has produced a morass of problems. These problems are antithetical to the values that the Framers embraced in the Constitution. These problems confirm that the Court has been wrong to entangle itself with the political process.

First, in embracing one person, one vote, the Court has arrogated to the Judiciary important value judgments that the Constitution reserves to the people. *Second,* the Court's efforts to monitor the political process have failed to provide any consistent guidance for the States. Even if it were justifiable for this Court to enforce some principle of majority rule, it has been unable to do so in a principled manner. Our precedents do not address the myriad other ways that minorities (or fleeting majorities) entrench themselves in the political system. States can place policy choices in their constitutions or have supermajoritarian voting rules in a legislative assembly.

So far as the Constitution is concerned, there is no single "correct" way to design a republican government. Any republic will have to reconcile giving power to the people with diminishing the influence of special interests. The wisdom of the Framers was that they recognized this dilemma and left it to the people to resolve. In trying to impose its own theory of democracy, the Court is hopelessly adrift amid political theory and interest-group politics with no guiding legal principles.

There is no single "correct" method of apportioning state legislatures. And the Constitution did not make this Court "a centralized politburo appointed for life to dictate to the provinces the 'correct' theories of democratic representation, [or] the 'best' electoral systems for securing truly 'representative' government." Because the majority continues that misguided search, I concur only in the judgment.

Justice ALITO, with whom Justice THOMAS joins except as to Part III-B, concurring in the judgment.

The question that the Court must decide in this case is whether Texas violated the "one-person, one-vote" principle established in Reynolds v. Sims (1964), by adopting a legislative redistricting plan that provides for districts that are roughly equal in total population. Appellants contend that Texas was required to create districts that are equal

in the number of eligible voters, but I agree with the Court that Texas' use of total population did not violate the one-person, one-vote rule.

Both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule. The decennial census required by the Constitution tallies total population. These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters. Since *Reynolds,* States have almost uniformly used total population in attempting to create legislative districts that are equal in size. And with one notable exception, Burns v. Richardson*,* (1966), this Court's post-*Reynolds* cases have likewise looked to total population. Moreover, much of the time, creating districts that are equal in total population also results in the creation of districts that are at least roughly equal in eligible voters. I therefore agree that States are permitted to use total population in redistricting plans.

Although this conclusion is sufficient to decide the case before us, Texas asks us to go further and to hold that States, while generally free to use total population statistics, are not barred from using eligible voter statistics. Whether a State is permitted to use some measure other than total population is an important and sensitive question that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts.

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4. Counting "Uncounted" Votes in a Presidential Election: Bush v. Gore

On December 12, 2000, for the first time in American history, the Supreme Court essentially decided who would be the next president of the United States.

THE EVENTS LEADING TO BUSH v. GORE

The presidential election of Tuesday, November 7, 2000, was one of the closest in American history. By early Wednesday morning, it was clear that the Democratic candidate, Vice President Albert Gore, had won the national popular vote, but the outcome of the electoral vote was uncertain. The presidency turned on Florida and its 25 electoral votes. Early on election night, the television networks called Gore the winner in Florida, only to retract their prediction later in the evening. In the early hours of Wednesday, November 8, the networks declared George W. Bush the winner of Florida and the presidency, only to recant a short time later and conclude that the outcome in Florida, and thus of the national election, was too close to call.

On November 8, the Florida Division of Elections reported that Bush had received 2,909,135 votes and Gore had received 2,907,351 votes. Florida law provides for a recount of votes if the election is decided by less than one-half of 1 percent of the votes cast.[42]

Because the difference in votes between the two candidates was less than one-half of 1 percent, Gore immediately asked for a machine recount of the tally of votes in four counties: Volusia, Palm Beach, Broward, and Miami-Dade. On November 9, Florida Secretary of State Katherine Harris declined to extend the statutory deadline for county vote totals beyond November 14. By this point, the machine recount had narrowed Bush's lead to a mere 327 votes.

Upon learning of the close margin between him and Bush, Gore petitioned and received permission to conduct a hand recount in the four counties in question. On Saturday, November 11, Bush sued in federal district court to block the manual recount, but this request was denied.

However, Secretary of State Harris emphasized that she would enforce the November 14 deadline and would not accept late recounts from counties in Florida. She said that the Florida election statute required counties to report their votes within one week of the election, unless one of the statutory exceptions was met. These included "proof of fraud that affects the outcome of the election, substantial noncompliance with statutory election procedures, and a reasonable doubt exist[ing] as to whether the certified results expressed the will of the voters," or where compliance with the deadline is "prevented as a result of an act of God, or extenuating circumstances beyond control."

The four counties submitted their responses and requested acceptance of late completion of totals; Harris denied each one. A suit was brought against Harris in Florida state court to compel her to accept the time for the reporting of the results. On Friday, November 17, the Florida state trial court ruled in favor of Harris. On Monday, November 20, the Florida Supreme Court held a nationally televised hearing. On Tuesday night, November 21, the Florida Supreme Court unanimously reversed the trial court and ordered that the secretary of state accept hand recounts from the four counties if they were completed by Sunday, November 26, at 5:00 P.M., or Monday morning, if the secretary of state's office was not open for business on Sunday afternoon.

The Florida Supreme Court ruled that Florida's secretary of state abused her discretion in refusing to extend the deadline for certifying elections so as to provide the time needed for the recounts. The Court said it was confronted with a conflict between two statutes. One statute, Fla. Stat. §102.111, provides that local election canvassing boards must provide their results "by 5:00 of the seventh day following an election." This law was amended in 1989 by §102.112, which provides that election results may be ignored and board members shall be fined if these deadlines are not met.

However, another statute, Fla. Stat. §102.166(4)(a), specifically allows any candidate to request a manual recount. This provision states, "[A]ny candidate whose name appeared on the ballot . . . or any political party whose candidate's name appeared on the ballot may file a written request with the county canvassing board for a manual recount." The law provides that the written request may be made prior to the time the board certifies the returns or within 72 hours after the election—whichever occurs later.

The Florida Supreme Court expressly noted that these statutes "conflict." The court relied on "traditional rules of statutory construction"—such as that specific laws prevail

over general ones and the more recently enacted law takes precedence over the older one—and concluded that Harris erred in denying the extension of time for the counting.

The Florida Supreme Court also said that "a statutory provision will not be construed in such a way that renders meaningless or absurd any other statutory provision." In order to effectuate the law allowing recounts, the court concluded that time must be allowed in which to conduct the recount. The court said that the secretary of state's refusal to accept hand recounts was wrong because it completely negated the statute that expressly provided for this.

On Friday, November 24, the day after Thanksgiving, the Supreme Court granted certiorari in this case and scheduled oral argument for the following Friday, December 1. In an unprecedented order, the Court permitted the broadcasting of the oral argument immediately after it was finished. A few days later, in Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000), the Supreme Court remanded the case back to the Florida Supreme Court for clarification of its earlier decision. The U.S. Supreme Court, in a *per curiam* opinion, said it was unclear whether the Florida court's decision was based on its interpretation of the Florida Constitution or Florida statutes. The former apparently would be an impermissible basis for decision, while the latter would be acceptable, based on the U.S. Supreme Court's interpretation of federal election laws. On Monday, December 11—the same day the Supreme Court held oral argument in Bush v. Gore—the Florida Supreme Court issued a decision saying its decision was based on interpreting Florida's statutes, not its constitution.

Meanwhile, on Sunday, November 26, some counties asked for additional time to complete their counting. For example, Palm Beach County asked for two additional hours beyond the Sunday 5:00 P.M. deadline set by the Florida Supreme Court, particularly because the state Supreme Court expressly had allowed the secretary of state to wait until Monday morning before receiving the recount totals. The secretary of state refused all requests for extensions. On Sunday night, November 26, the Florida Elections Canvassing Commission certified the election results: Bush was determined to be the winner of Florida by 537 votes and thus the winner of Florida's 25 electoral votes.

On Monday, November 27, Gore filed suit in Florida under the Florida law providing for "contests" of election results.[43] This provision, §102.168(3)(c), provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The statute authorizes a court, if it finds there are successful grounds for a contest, to "provide any relief appropriate under such circumstances." Fla. Stat. §102.168(8).

On Saturday and Sunday, December 2 and 3, a Florida state trial court held a hearing as to whether Gore had met the statutory requirements for a successful contest. On Monday, December 4, the Florida trial court ruled against Gore on the grounds that Gore failed to prove a "reasonable probability" that the election would have turned out differently if not for problems counting ballots.

The Florida Supreme Court granted review and scheduled oral arguments for Thursday, December 7. On Friday afternoon, December 8, the Florida Supreme Court, by a four-to-three decision, reversed the trial court. The Florida Supreme Court ruled that the trial

court had used the wrong standard in insisting that Gore demonstrate a "reasonable probability" that the election would have been decided differently. The Florida Supreme Court said the statute requires only a showing of "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."

The Florida Supreme Court ordered "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes . . . to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." The Florida Supreme Court also determined that Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes for Vice President Gore and that these should be included in the vote total even though they were reported after the deadline of Sunday, November 26.

Just hours after the Florida Supreme Court's decision, on Friday night, December 8, a Florida trial court judge ordered that the counting of the uncounted votes commence the next morning and that it be completed by Sunday afternoon, December 10, at 2:00 P.M. The judge said that he would resolve any disputes.

On Saturday morning, counting commenced as ordered. At the same time, Bush asked the U.S. Supreme Court to stay the counting and grant certiorari in the case. In the early afternoon on Saturday, the Supreme Court, in a five-to-four ruling, stayed the counting of the votes in Florida. Justice Stevens dissented on grounds there was not an irreparable injury, which is a requirement for such a stay. Justice Scalia wrote a short opinion, not joined by any other justice, in which he said the requirements for a stay were met. He said that Bush had shown a likelihood of prevailing on the merits and also irreparable injury. Justice Scalia said there were two such harms: First, there would be a cloud over the legitimacy of a Bush presidency if the counting showed Gore ahead, but the counting was disallowed by the Supreme Court. Second, handling of the ballots would lead to their degradation and prevent a more accurate counting later if that were ordered by the Court.

On Monday, December 11, the Supreme Court held oral arguments. Again, they were broadcast immediately after their completion. On Tuesday night, December 12, at approximately 10:00 P.M. eastern time, the Court released its opinion in Bush v. Gore.

BUSH v. GORE

531 U.S. 98 (2000)

PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and

Senator Joseph Lieberman, Democratic Candidates for President and Vice President. The Supreme Court noted that petitioner, Governor George W. Bush, asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand.

The court further held that relief would require manual recounts in all Florida counties where so-called undervotes had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican Candidates for the Presidency and Vice Presidency, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari.

On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner, Governor Bush, had received 2,909,135 votes, and respondent, Vice President Gore, had received 2,907,351 votes, a margin of 1,784 for Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent . . . of the votes cast," an automatic machine recount was conducted under §102.141(4) of the election code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. §102.166 (2000). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. Bush v. Palm Beach County Canvassing Bd. (2000) (per curiam). On December 11, the Florida Supreme Court issued a decision on remand reinstating that date.

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. He sought relief pursuant t