LIBERTY, EQUALITY, AND DUE PROCESS: CASES, CONTROVERSIES, AND CONTEXTS IN CONSTITUTIONAL LAW



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Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law

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She is one of the 26 professors selected for inclusion in WHAT THE BEST LAW TEACHERS DO (Harvard University Press, 2013).

Preface

This Casebook is intended as a Casebook for a course in Constitutional rights, focused on the guarantees of liberty, equal protection, and due process in the United States Constitution.

It stresses the doctrinal developments but also explores the theoretical and historical contours focusing on the Fourteenth Amendment to the United States Constitution. The Casebook presents basic concepts of constitutional adjudication and federalism, stresses equal protection doctrine and substantive due process, and introduces other constitutional liberties including the Second Amendment.

The Notes accompanying the cases emphasize skill development in constitutional analysis.

Notes on typography

Court opinions often have typographical marks such as ellipses, brackets, and parenthesis. Some more recent Court opinions also have a series of floating asterisk before the concluding paragraph or paragraphs.

Court opinions also generally have extensive citations. Many of these are included in the edited versions in this Casebook. However, complete citations are often omitted and references omitted or condensed without editorial indications.

Editorial marks in court opinions are as follows:

Omissions from text are indicated by a series of four asterisks: * * * *

Additions to text are enclosed by curly brackets: { }

Introduction

1

This is where you can write your introduction.

CHAPTER OVERVIEW

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1.1: CHAPTER ONE- An Introduction to Constitutional Law and the Issue of State Action

I. Introduction

The doctrine of "state action" is integral to American Constitutional law. With one notable exception, the United States Constitution protects individual rights only against incursions by governments, whether federal, state, or local. Generally, the Constitution does not govern the "rights" of individuals arguably infringed by other individuals (or corporations).

Note that while the term generally used is "state action," "state" here means all levels of government. Thus, "state action" can be the federal government or a municipal government, as well as a state.

Sometimes, the question of "state action" is relatively simple.

Consider whether a judge would be likely to grant or deny a motion to dismiss for failure to allege sufficient state action, if the plaintiff alleged a violation of the First Amendment:

A. The California Legislature passed a statute that violated the plaintiff's First Amendment right to freedom of speech.

B. The City of Austin, in Texas, passed an ordinance that violated the plaintiff's First Amendment right to free exercise of religion.

C. The Department of Prisons of Nevada, a state administrative agency, promulgated a regulation that violated plaintiff's right to receive mail in violation of the First Amendment.

D. The President of the United States issued an Executive Order that violated the plaintiff's First Amendment right to free exercise of religion.

E. Federal Bureau of Investigation officers arrested plaintiff in violation of her First Amendment rights to assembly.

F. A principal at a public school suspended plaintiff, a student, for wearing "inappropriate attire" in violation of her First Amendment rights to "symbolic speech."

G. A father at the dinner table told his son to be quiet in violation of the child's First Amendment rights to freedom of speech.

H. A rider on the subway shouted and blocked the way of subway performers in violation of their First Amendment rights to "artistic expression."

I. A salesclerk in the Abercrombie & Fitch store on Fifth Avenue in New York asks a customer wearing a head covering to leave the store in violation of her First Amendment rights.

Determining whether or not an action qualifies as "state action" is not always so simple, as the cases in this Chapter demonstrate.

II. Constitutional Provisions

Let's begin by examining the text of some specific Constitutional provisions. Look for the "state action" requirement, recalling that this includes the federal government. Is the language in some provisions more explicit than in others? Is it absent in any?

A. Fourteenth Amendment

Section 1 of the Fourteenth Amendment provides:

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.

B. First Amendment

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.

C. Fifth Amendment

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.

D. Thirteenth Amendment

Section 1 of the Thirteenth Amendment provides:

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.

III. The "Civil Rights Cases"

Both the Thirteenth Amendment and Fourteenth Amendment became part of the Constitution after the Civil War (1861-1865). The Thirteenth Amendment does not have a state action requirement: slavery and involuntary servitude are prohibited.

Along with the Fifteenth Amendment ("*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude*"), these Amendments are also known as the "Reconstruction Amendments."

Each of the Reconstruction Amendments also includes a section that states that "Congress shall have the power to enforce" the Amendment by "appropriate legislation."

Congress passed the Civil Rights Act of 1875 forbidding racial discrimination in public accommodations including trains, hotels, theaters, and inns. Individuals who discriminated on the basis of race could be subject to civil and criminal penalties.

In five consolidated cases known as the *Civil Rights Cases*, 109 U.S. 3 (1883), the United States Supreme Court held that the Civil Rights Act of 1875 was unconstitutional. It held that Congress did not have the power under either the Thirteenth or Fourteenth Amendments to prohibit racial discrimination by private persons. In short, the Court held that the Thirteenth Amendment's prohibition of slavery did not include racial discrimination and that the Fourteenth Amendment only reached "state aggression" not the "wrongful acts of individuals."

The *Civil Rights Cases* are difficult; we will return to the case at the end of this Chapter. But as you examine the next cases, notice whether the Court considered the precedent of the *Civil Rights Cases*.

IV. Toward a Doctrine of State Action

Marsh v. Alabama

326 U.S. 501 (1946)

Black, J., delivered the opinion of the Court in which Douglas, Murphy and Rutledge, JJ., joined. Frankfurter, J., filed a concurring opinion. Reed., J., filed a dissenting opinion in which Stone, C.J., and Burton, J., joined. Jackson, J., took no part in the consideration or decision of the case.

Mr. 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. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. 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 Title 14, Section 426 of 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. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. The State Supreme Court denied certiorari, and the case is here on appeal under Section 237(a) of the Judicial Code, 28 U.S.C. s 344(a).

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. * * * * [H]ad the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. 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 can not 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. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. * * * *

We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block. 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.

Reversed and remanded.

* {Footnote 5 of Court's opinion} In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23. The percentage varied from nine per cent in Illinois and Indiana and 64 percent in Kentucky, to almost 80 per cent in West Virginia. U.S. Coal Commission, Report, 1925, Part III, pp. 1467, 1469 summarized in Morris, The Plight of the Coal Miner, Philadelphia 1934, Ch. VI, p. 86. The most recent statistics we found available are in Magnusson, Housing by Employers in the United States, Bureau of Labor Statistics Bulletin No. 263 (Misc. Ser.) p. 11. *See also* United States Department of Labor, Wage and Hour Division, Data on Pay Roll Deductions, Union Manufacturing Company, Union Point, Georgia, June 1941; Rhyne, Some Southern Cotton Mill Workers and Their Villages, Chapel Hill, 1930 (Study completed under the direction of the Institute for Research in Social Science at the University of North Carolina); Comment, *Urban Redevelopment*, 54 Yale L.J. 116.

Mr. Justice Frankfurter, concurring.

* * * * A company-owned town gives rise to a network of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and to disseminate his ideas. Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution. * * * *

Mr. Justice Reed, dissenting.

* * * * This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case. * * * *

The Chief Justice and Mr. Justice Burton join in this dissent.

Check Your Understanding

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Shelley v. Kraemer

334 U.S. 1 (1948)

Vinson, C.J., delivered the opinion of the Court in which Black, Frankfurter, Douglas, Murphy and Burton, JJ., joined. Reed, Jackson and Rutledge, JJ., took no part in the consideration or decision of the case.

Chief Justice Vinson delivered the Opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. 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. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

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 the 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. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. * * * *

I

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. * * * *

{But 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. We do not

understand respondents to urge the contrary. * * * *

{But} Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases* (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II

* * * * [T]he 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. * * * * [I]t 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.

III

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.* * * *

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh.* * * * *

Reversed.

Mr. Justice Reed, Mr. Justice Jackson, and Mr. Justice Rutledge took no part in the consideration or decision of these cases.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes

1. Did you notice how the opinions in *Marsh* and *Shelley* did or did not cite the *Civil Rights Cases*?

2. How do notions of "private property" appear in the Court's opinions in *Marsh* and *Shelley*?

3. Understanding political, social, and economic movements and trends – – – "history" – – – occurring at the time of a Court's opinion can be a useful adjunct to understanding (and even memorizing) doctrine. Are there aspects of history that you can discern from these cases? What particular language from the opinions support your opinions?

Note: State Action in the Civil Rights Era: *Burton & Irvis*

State action doctrine was an important issue in "civil rights" struggles, with the courts deciding many cases determining whether the Fourteenth Amendment's Equal Protection Clause was applicable to institutions which practiced racial segregation. Two cases are especially important and illustrate the Court's changing views: *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). Both involved prominent Black men challenging their racially-motivated exclusion from spaces.

Burton involved the Eagle Coffee Shoppe, Inc., which the Court described as "a restaurant located within an off-street automobile parking building in Wilmington, Delaware." The building was "owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee." The Delaware Supreme Court held that the coffee shoppe, in refusing service to William Burton (the original plaintiff), was acting in "a purely private capacity" under its lease and

therefore there was no state action within the contemplation of the prohibitions contained in that Amendment. The United States Supreme Court reversed.

The Court stated that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.'" Instead, it is "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

The Court then proceeded with its task of "sifting facts and weighing circumstances," stating:

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" [by Delaware statute]. 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. Assuming that the distinction would be significant, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. 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. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. 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.

The Court found there was state action, thus subjecting the defendant to the requirements of the Fourteenth Amendment's Equal Protection Clause.

Dissenting, Justice Harlan, joined by another Justice, wrote that the "Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action.'"

In an opinion rendered a little more than a decade later, the United States Supreme Court distinguished *Burton* in *Moose Lodge v. Irvis*. In *Irvis*, the Court found that a local Moose Lodge in Harrisburg, Pennsylvania was not a state actor, and thus its refusal to serve Irvis alcohol was not subject to the Fourteenth Amendment's Equal Protection Clause. The opinion for the Court by Justice Rehnquist described Moose Lodge as:

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.

The Court provided a review of state action doctrine:

In 1883, this Court in the *Civil Rights Cases*, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley* v. *Kraemer* (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer* and in *Burton* v. *Wilmington Parking Authority* (1961).

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority.*

Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley.* The Court held in *Burton* that a private restaurant owner who refused service because of a customer's race violated the Fourteenth Amendment, where the restaurant was located in a building owned by a state created parking authority and leased from the authority. The Court, after a comprehensive review of the relationship between the lessee and the parking authority concluded that the latter had 'so far insinuated itself into a position of interdependence with Eagle (the restaurant owner) 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.

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. * * * * Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," 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. *Peterson v. City of Greenville* (1963) dealt with the trespass prosecution of persons who 'sat in' at a restaurant to protest its refusal of service to Negroes. There the Court held that although the ostensible initiative for the trespass prosecution came from the proprietor, the existence of a local ordinance requiring segregation of races in such places was tantamount to the State having "commanded a particular result." With one exception, there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination.

The exception in *Irvis* to which the Court referred was this: the Pennsylvania state Liquor Control Board adopted a regulation that affirmatively required that "(e)very club licensee shall adhere to all of the provisions" of the national organization's "Constitution and By-Laws." In other words, a local Moose Lodge club had to adhere to the rules of the national Moose Lodge organization. It was a rule of the national Moose Lodge that only white men could be members and only white people could be guests.

The majority stated this was not sufficient but stated that "*Shelley* makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment." So the Court ruled that Irvis was entitled to a decree enjoining the enforcement of the Liquor Board regulations "insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions," but that Irvis was "entitled to no more."

Dissenting, Justice Douglas, joined by Justice Marshall, argued that liquor licenses in Pennsylvania, "unlike driver's licenses, or marriage licenses, are not freely available to those who meet racially neutral qualifications," and that under the "complex quota system," the quota for Harrisburg, where Moose Lodge No. 107 was located, has been full for many years:

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. * * * *

Blum v. Yaretsky

457 U.S. 991 (1982)

Rehnquist, J., delivered the Opinion of the Court, in which Burger, C. J., and Blackmun, Powell, Stevens, and O'Connor, JJ., joined. White, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined.

Justice Rehnquist delivered the opinion of the Court.

Respondents represent a class of Medicaid patients challenging decisions by the nursing homes in which they reside to discharge or transfer patients without notice or an opportunity for a hearing. The question is whether the State may be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment.

I

Congress established the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, (1976 ed. and Supp.IV), to provide federal financial assistance to States that choose to reimburse certain medical costs incurred by the poor. As a participating State, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNF's) or "health related facilities" (HRF's). The latter provide less extensive, and generally less expensive, medical care than the former. Nursing homes chosen by Medicaid patients are directly reimbursed by the State for the reasonable cost of health care services, N.Y.Soc.Serv.Law § 367–a.1 (McKinney Supp.1981).

An individual must meet two conditions to obtain Medicaid assistance. He must satisfy eligibility standards defined in terms of income or resources and he must seek medically necessary services. See 42 U.S.C. § 1396. To assure that the latter condition is satisfied, federal regulations require each nursing home to establish a utilization review committee (URC) of physicians whose functions include periodically assessing whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified. If the URC determines that the patient should be discharged or transferred to a different level of care, either more or less intensive, it must notify the state agency responsible for administering Medicaid assistance.

At the time their complaint was filed, respondents Yaretsky and Cuevas were patients in the American Nursing Home, an SNF located in New York City. Both were recipients of assistance under the Medicaid program. In December 1975 the nursing home's URC decided that respondents did not need the care they were receiving and should be transferred to a lower level of care in an HRF. New York City officials, who were then responsible for administering the Medicaid program in the city, were notified of this decision and prepared to reduce or terminate payments to the nursing home for respondents' care. Following administrative hearings, state social service officials affirmed the decision to discontinue benefits unless respondents accepted a transfer to an HRF providing a reduced level of care.

Respondents then commenced this suit, acting individually and on behalf of a class of Medicaid-eligible residents of New York nursing homes. Named as defendants were the Commissioners of the New York Department of Social Services and the Department of Health. Respondents alleged in part that the defendants had not afforded them [the constitutionally required] notice either of URC decisions and the reasons supporting them or of their [constitutional] right to an administrative hearing to challenge those decisions. Respondents maintained that these actions violated their rights under state and federal law and under the Due Process Clause of the Fourteenth Amendment. They sought injunctive relief and damages.

In January 1978 the District Court certified a class and issued a preliminary injunction, restraining the defendants from reducing or terminating Medicaid benefits without timely written notice to the patients, provided by state or local officials, of the reasons for the URC decision, the defendants' proposed action, and the patients' right to an evidentiary hearing and continued benefits pending administrative resolution of the claim. The court's accompanying opinion relied primarily on existing federal and state regulations.

* * * * Respondents asserted that [any patient] transfers deprived patients of interests protected by the Fourteenth Amendment and were the product of "state action."

In October 1979 the District Court approved a consent judgment * * * * [but the consent judgment] left several issues of law to be decided by the District Court. The most important, for our purposes, was "whether there is state action and a constitutional right to a pre-transfer evidentiary hearing in a patient transfer * * * initiated by the facility or its agents." Ultimately, the District Court answered that question in respondents' favor, although without elaborating its reasons. The court permanently enjoined petitioners, as well as all SNF's and HRF's in the State, from permitting or ordering the discharge of class members, or their transfer to a different level of care, without providing advance written notice and an evidentiary hearing on "the validity and appropriateness of the proposed action."

The Court of Appeals for the Second Circuit affirmed that portion of the District Court's judgment we have described above. The court held that * * * all discharges and transfers initiated by the nursing homes or attending physicians, "involve state action affecting constitutionally protected property and liberty interests." The court premised its identification of state action on the fact that state authorities "responded" to the challenged transfers by adjusting the patients' Medicaid benefits. Citing our opinion in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), the court viewed this response as establishing a sufficiently close "nexus" between the State and either the nursing homes or the URC's to justify treating their actions as those of the State itself.

We granted certiorari to consider the Court of Appeals' conclusions about the nature of state action. We now reverse its judgment.

II

[The Court considered whether the respondents had "standing" and had demonstrated that they were personally injured. The Court held that they did.]

We turn now to the "state action" question presented by petitioners.

III

The Fourteenth Amendment of the Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." Since this Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (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." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley.* See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, (1970).

Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint. In this case, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards. They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. But respondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

A

This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it "state" action for purposes of the Fourteenth Amendment. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.* (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, (1972). It also differs from other "state action" cases in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit; in such cases the question typically is whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State. See, *e.g., Peterson v. City of Greenville*, 373 U.S. 244 (1963). But both these types of cases shed light upon the analysis necessary to resolve the present case.

First, although it is apparent that nursing homes in New York are extensively regulated, "[t]he 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." *Jackson v. Metropolitan Edison Co.*, 419 U.S., at 350. The complaining party must also show that "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." *Id.*, at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 166; *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357; *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 173; *Adickes v. S. H. Kress & Co.*, 398 U.S.

at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. *See Flagg Bros.*, 436 U.S. at 164–165; *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357.

Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*,419 U.S. at 353; *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 157–161.

B

Analyzed in the light of these principles, the Court of Appeals' finding of state action cannot stand. The court reasoned that state action was present in the discharge or transfer decisions implemented by the nursing homes because the State responded to those decisions by adjusting the patient's Medicaid benefits. Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Respondents do not rest on the Court of Appeals' rationale, however. They argue that the State "affirmatively commands" the summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in their nursing facilities. Were this characterization accurate, we would have a different question before us. However, our review of the statutes and regulations identified by respondents does not support respondents' characterization of them.

As our earlier summary of the Medicaid program explained, a patient must meet two essential conditions in order to obtain financial assistance. He must satisfy eligibility criteria defined in terms of income and resources and he must seek medically necessary services. To assure that nursing home services are medically necessary, federal law requires that a physician so certify at the time the Medicaid patient is admitted and periodically thereafter. New York requires that the physician complete a "long term care placement form" devised by the Department of Health, called the DMS-1. A completed form provides, *inter alia*, a numerical score corresponding to the physician's assessment of the patient's mental and physical health. As petitioners note, however, the physicians, and not the forms, make the decision about whether the patient's care is medically necessary. A physician can authorize a patient's admission to a nursing facility despite a "low" score on the form. We cannot say that the State, by requiring completion of a form, is responsible for the physician's decision.

In any case, respondents' complaint is about nursing home decisions to discharge or transfer, not to admit, Medicaid patients. But we are not satisfied that the State is responsible for those decisions either. The regulations cited by respondents require SNF's and HRF's "to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs." The nursing homes are required to complete patient care assessment forms designed by the State and "provide the receiving facility or provider with a current copy of same at the time of discharge to an alternate level of care facility or home."

These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State. This case, therefore, is not unlike *Polk County v. Dodson*, 454 U.S. 312 (1981), in which the question was whether a public defender acts "under color of" state law * * * * when representing an indigent defendant in a state criminal proceeding. Although the public defender was employed by the State and appointed by the State to represent the respondent, we concluded that "[t]his assignment entailed functions and obligations in no way dependent on state authority." The decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State. The same is true of nursing home decisions to discharge or transfer particular patients because the care they are receiving is medically inappropriate.

Respondents next point to regulations which, they say, impose a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate. One regulation excludes from participation in the Medicaid program health care providers who "[f]urnished items or services that are substantially in excess of the beneficiary's needs." The State is also authorized to fine health care providers who violate applicable regulations. As we have previously concluded, however, those

regulations themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondents' claim of state action.

As an alternative position, respondents argue that even if the State does not command the transfers at issue, it reviews and either approves or rejects them on the merits. The regulations cited by respondents will not bear this construction. Although the State requires the nursing homes to complete patient care assessment forms and file them with state Medicaid officials, and although federal law requires that state officials review these assessments, nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services. Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself.

Finally, respondents advance the rather vague generalization that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients. For this proposition they rely upon *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Respondents argue that state subsidization of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the State, taken together convert the action of the homes into "state" action. But accepting all of these assertions as true, we are nonetheless unable to agree that the State is responsible for the decisions challenged by respondents. As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton. Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357–358. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353. Respondents' argument in this regard is premised on their assertion that both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. The state constitutional provisions cited by respondents, however, do no more than authorize the legislature to provide funds for the care of the needy. They do not mandate the provision of any particular care, much less long-term nursing care. Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal moneys. It does not require that the States provide the services themselves. Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

IV

We conclude that respondents have failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care. Consequently, they have failed to prove that petitioners have violated rights secured by the Fourteenth Amendment. The contrary judgment of the Court of Appeals is accordingly

Reversed.

Justice Brennan, with whom Justice Marshall, joins, dissenting.

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

In deciding whether "state action" is present * * * the ultimate determination is simply whether the defendant has brought the force of the State to bear against the plaintiff in a manner the Fourteenth Amendment was designed to inhibit. Where the defendant is a government employee, this inquiry is relatively straightforward. But in deciding whether "state action" is present in actions

performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). See *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 939–942 (1982). The Court today departs from the *Burton* precept, ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decisionmaking process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

I

A

The Court's analysis in this case is simple, but it is also demonstrably flawed, for it proceeds upon a premise that is factually unfounded. The Court first describes the decision to transfer a nursing home resident from one level of care to another as involving nothing more than a physician's independent assessment of the appropriate medical treatment required by that resident. Building upon that factual premise, the Court has no difficulty concluding that the State plays no decisive role in the transfer decision: By reducing the resident's benefits to meet the change in treatment prescribed, the State is simply responding to "medical judgments made by private parties according to professional standards that are not established by the State." If this were an accurate characterization of the circumstances of this case, I too would conclude that there was no "state action" in the nursing home's decision to transfer. A doctor who prescribes drugs for a patient on the basis of his independent medical judgment is not rendered a state actor merely because the State may reimburse the patient in different amounts depending upon which drug is prescribed.

But the level-of-care decisions at issue in this case, even when characterized as the "independent" decision of the nursing home have far less to do with the exercise of independent professional judgment than they do with the *State's* desire to save money. To be sure, standards for implementing the level-of-care scheme established by the Medicaid program are framed with reference to the underlying purpose of that program—to provide needed medical services. And not surprisingly, the State relies on doctors to implement this aspect of its Medicaid program. But the idea of two mutually exclusive levels of care—skilled nursing care and intermediate care—embodied in the federal regulatory scheme and implemented by the State, reflects no established medical model of health care. On the contrary, the two levels of long-term institutionalized care enshrined in the Medicaid scheme are legislative constructs, designed to serve governmental cost-containment policies.

The fiscal underpinning of the level-of-care determinations at issue here are apparent from the legislative history of the "intermediate care" concept. [The dissent extensively discussed the legislative history and amendments to the federal statute as well as the New York statutes and regulations].

B

* * * * As a fair reading of the relevant regulations makes clear, the State (and Federal Government) have created, and administer, the level system as a cost-saving tool of the Medicaid program. The impetus for this active program of review imposed upon the nursing home operator is primarily this fiscal concern. The State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, "[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients." Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

II

The deficiency in the Court's analysis is dramatized by its inattention to the special characteristics of the nursing home. Quite apart from the State's specific involvement in the transfer decisions at issue in this case, the nature of the nursing home as an institution, sustained by state and federal funds, and pervasively regulated by the State so as to ensure that it is properly implementing the governmental undertaking to provide assistance to the elderly and disabled that is embodied in the Medicaid program, undercuts the Court's sterile approach to the state action inquiry in this case. The private nursing homes of the Nation exist, and profit, at the sufferance of state and federal Medicaid and Medicare agencies. 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*, 365 U.S. 715 (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. For many, the totality of their social network is the nursing home community. Within that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and, in every significant respect, the functional equivalent of a State. *Cf. Marsh v. Alabama*, 326 U.S. 501 (1946). Surely, in this context we must be especially alert to those situations in which the State "has elected to place its power, property and prestige behind" the actions of the nursing home owner. See *Burton v. Wilmington Parking Authority*, 365 U.S. at 725.

Yet, whatever might be the status of the nursing home operator where the State has simply left the resident in his charge, while paying for the resident's support and care, it is clear that the State has not simply left nursing home patients to the care of nursing home operators. No one would doubt that nursing homes are "pervasively regulated" by State and Federal Governments; virtually every action by the operator is subject to state oversight. But the question at this stage is not whether the procedures set forth in the state and federal regulatory scheme are sufficient to protect the residents' interests. We are confronted with the question *preliminary* to any Fourteenth Amendment challenge: whether the State has brought its force to bear against the plaintiffs through the office of these private parties. In answering that question we may safely assume that when the State chooses to perform its governmental undertakings through private institutions, and with the aid of private parties, not every action of those private parties is state action. But when the State directs, supports, and encourages those private parties to take specific action, that is state action.

We may hypothesize many decisions of nursing home operators that affect patients, but are not attributable to the State. But with respect to decisions to transfer patients downward from one level of care to another, if that decision is in any way connected with the statutory review structure set forth above, then there is no doubt that the standard for decision, and impetus for the decision, is the responsibility of the State. Indeed, with respect to the level-of-care determination, the State does everything but pay the nursing home operator a fixed salary. Because the State is clearly responsible for the specific conduct of petitioners about which respondents complain, and because this renders petitioners state actors for purposes of the Fourteenth Amendment, I dissent.

Notes

1. Is there a "test" for state action in *Blum v. Yarestky*?

2. How does the Court's majority opinion in *Blum* cite *Burton*? *Moose Lodge v. Irvis*?

3. The majority and the dissenting opinions appear to agree that *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), is not directly on point: the majority states that the present case is "obviously different" from several cases, including *Jackson* and *Irvis*. But how does the majority rely on the "rule" from *Jackson* in constructing its own "test"?

V. What is the "Test" for State Action?

Note: Peremptory Challenges and *Batson*

In order to understand the next case, *Edmonson v. Leesville Concrete Company, Inc.*, it is necessary to be familiar with two underlying legal matters: peremptory challenges and *Batson v. Kentucky* (1986).

Peremptory challenges are part of the process of selecting a jury. American courts generally allow attorneys a role in selecting the jury in criminal and civil cases. Each attorney may ask the judge to exclude a potential juror "for cause" – for example, because the juror is related to a party or who exhibits explicit bias. In addition, each attorney has a number of "peremptory challenges," under which a potential juror is excluded at the attorney's request regardless of whether good causes exist for the exclusion.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that it was a denial of equal protection for a prosecutor to use peremptory challenges in a criminal case for the purpose of excluding racial minorities from the jury. The Court in *Batson* held that a defendant must first show that he is a member of a "cognizable racial group" and that the prosecutor has used the peremptory challenges to exclude potential jurors from that racial group. After this initial prima facie showing, the burden then shifts to the prosecutor to demonstrate that there was a race neutral reason for exercising the peremptory challenge against that potential juror. The defendant can argue that the prosecutor's proffered neutral reason is pretextual. The judge then rules on whether the peremptory challenge can be exercised against the potential jurors consistent with equal protection.

Edmonson v. Leesville Concrete Company, Inc.

500 U.S. 614 (1991)

Kennedy, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, Stevens, and Souter, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C.J., and Scalia, J., joined. Scalia, J., filed a dissenting opinion.

Justice Kennedy delivered the opinion of the Court.

* * * * Thaddeus Donald Edmonson, a construction worker, was injured in a job-site 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. * * * *

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*, 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 impaneled, 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.

* * * * With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.* (1982). One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

To implement these principles, courts must consider from time to time where the governmental sphere ends and the private sphere begins. Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. * * * *

{In *Lugar*,} 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. * * * * 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.

* * * * In the case before us, the challenges were exercised under a federal statute that provides, *inter alia:*

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

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. Although we have recognized that this aspect of the analysis is often a factbound inquiry, our cases

disclose certain principles of general application. 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, see *Tulsa Professional Collection Services, Inc. v. Pope* (1988); *Burton v. Wilmington Parking Authority* (1961); whether the actor is performing a traditional governmental function, see *Terry v. Adams* (1953); *Marsh v. Alabama* (1946); cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley v. Kraemer,* (1948). 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. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers. In the federal system, Congress has established the qualifications for jury service, and has outlined the procedures by which jurors are selected. To this end, each district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. This plan, as with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, and non-exclusion on account of race, color, religion, sex, national origin, or economic status. * * * *

At the outset of the selection process, prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. Failure to do so may result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service.

The trial judge exercises substantial control over *voir dire* in the federal system. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire *voir dire* by themselves.* * * * The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.

* * * * [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." In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," and in a significant way has involved itself with invidious discrimination.

In determining Leesville's state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. * * * * In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final. In some civil cases* * * * the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. A judgment based upon a civil verdict may be preclusive of issues in a later case, even where some of the parties differ. And in all jurisdictions a true verdict will

be incorporated in a judgment enforceable by the court. These are traditional functions of government, not of a select, private group beyond the reach of the Constitution.

If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality. At least a plurality of the Court recognized this principle in *Terry v. Adams* (1953). There we found state action in a scheme in which a private organization known as the Jaybird Democratic Association conducted whites-only elections to select candidates to run in the Democratic primary elections in Ford Bend County, Texas. The Jaybird candidate was certain to win the Democratic primary and the Democratic candidate was certain to win the general election.* * * *

The principle that the selection of state officials, other than through election by all qualified voters, may constitute state action applies with even greater force in the context of jury selection through the use of peremptory challenges. Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. The delegation of authority that in *Terry* occurred without the aid of legislation occurs here through explicit statutory authorization.

We find respondent's reliance on *Polk County v. Dodson* (1981) unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. "[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, … a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."

In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury-selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson*, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.

Our decision in *West v. Atkins* (1988) provides a further illustration. We held there that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but we held his "function[s] within the state system, not the precise terms of his employment, [determined] whether his actions can fairly be attributed to the State." We noted:

Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.

In the case before us, the parties do not act pursuant to any contractual relation with the government. Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

* * * * It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In *Batson*, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.

Justice O'Connor, with whom The Chief Justice and Justice Scalia join, dissenting {omitted}.

Justice Scalia, dissenting {omitted}{arguing the decision will have concrete costs}.

Notes

1. Are you prepared to articulate the "test" from *Edmonson*?

2. Using the attorney for Leesville Concrete Company, Inc. as a possible "state actor," describe other situations in which he might be a state actor and situations in which he clearly would not be a state actor.

3. How would you use the doctrine developed in *Batson* in your "rule" or "holding" of *Edmonson*?

Manhattan Community Access Corporation v. Halleck

588 U.S. ___ (2019)

Kavanaugh, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, and Gorsuch, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, Breyer, and Kagan, JJ., joined.

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.*, 419 U.S. 345 (1974).

This state-action case concerns the public access channels on Time Warner's [now Spectrum] 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. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

I

A

Since the 1970s, public access channels have been a regular feature on cable television systems throughout the United States. * * * * 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.

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. 16 N.Y. Codes, Rules & Regs. §§ 895.1(f), 895.4(b) (2018). 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 Spectrum] 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.

B

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. The District Court agreed with MNN and dismissed the producers' First Amendment claim.

The Second Circuit reversed in relevant part. In the majority opinion authored by Judge Newman and joined by Judge Lohier, the court stated that the public access channels in Manhattan are a public forum for purposes of the First Amendment. Reasoning that "public forums are usually operated by governments," the court concluded that MNN is a state actor subject to First Amendment constraints. Judge Lohier added a concurring opinion, explaining that MNN also qualifies as a state actor for the independent reason that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Judge Jacobs dissented in relevant part, opining that MNN is not a state actor. He reasoned that a private entity's operation of an open forum for speakers does not render the host entity a state actor. Judge Jacobs further stated that the operation of public access channels is not a traditional, exclusive public function.

We granted certiorari to resolve disagreement among the Courts of Appeals on the question whether private operators of public access cable channels are state actors subject to the First Amendment. Compare 882 F. 3d 300 (case below), with *Wilcher v. Akron*, 498 F. 3d 516 (6th Cir. 2007); and *Alliance for Community Media v. FCC*, 56 F. 3d 105 (D.C. Cir. 1995).

II

Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States. * * * * The text and original meaning of those 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. See *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 295–296 (2001). 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, see, *e.g.*, *Jackson*, 419 U.S. at 352–354; (ii) when the government compels the private entity to take a particular action, see, *e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004–1005 (1982); or (iii) when the government acts jointly with the private entity, see, *e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–942 (1982).

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.

A

Under the Court's cases, a private entity may qualify as a state actor when it exercises "powers traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. 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. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson*, 419 U.S. at 352–353; *Evans v. Newton*, 382 U.S. 296, 300 (1966).

The Court has stressed that "very few" functions fall into that category. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). Under the Court's cases, those functions include, for example, running elections and operating a company town. See *Terry v. Adams*, 345 U.S. 461, 468–470 (1953) (elections); *Marsh v. Alabama*, 326 U.S. 501, 505–509 (1946) (company town); *Smith v. Allwright*, 321 U.S. 649, 662–666 (1944) (elections); *Nixon v. Condon*, 286 U.S. 73, 84–89 (1932) (elections).* 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. [citations omitted].

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.

* {Court's footnote 1}Relatedly, this Court has recognized that a private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity. In *West* v. *Atkins*, for example, the State was constitutionally obligated to provide medical care to prison inmates. 487 U. S. 42, 56 (1988). That scenario is not present here because the government has no such obligation to operate public access channels.

B

To avoid that conclusion, the producers widen the lens and contend that the relevant function here is not simply the operation of public access channels on a cable system, but rather is more generally the operation of a public forum for speech. And according to the producers, operation of a public forum for speech is a traditional, exclusive public function.

That analysis mistakenly ignores the threshold state-action question. When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content. See, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975) (private theater leased to the city); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 93, 96 (1972) (sidewalks); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515–516 (1939) (streets and parks).

By contrast, when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum. This Court so ruled in its 1976 decision in *Hudgens* v. *NLRB*. There, the Court held that a shopping center owner is not a state actor subject to First Amendment requirements such as the public forum doctrine. 424 U.S. at 520–521.

The *Hudgens* decision reflects a commonsense principle: Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. After all, private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights. As Judge Jacobs [in the Second Circuit opinion dissenting in part] persuasively explained, it "is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment."

In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.

If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether. "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Hudgens*, 424 U.S. at 519. Benjamin Franklin did not have to operate his newspaper as "a stagecoach, with seats for everyone." F. Mott, American Journalism 55 (3d ed. 1962). That principle still holds true. As the Court said in *Hudgens*, to hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.[2]

The producers here are seeking in effect to circumvent this Court's case law, including *Hudgens*. But *Hudgens* is sound, and we therefore reaffirm our holding in that case.[3]

C

Next, the producers retort that this case differs from *Hudgens* because New York City has designated MNN to operate the public access channels on Time Warner's cable system, and because New York State heavily regulates MNN with respect to the public access channels. Under this Court's cases, however, those facts do not establish that MNN is a state actor.

New York City's designation of MNN to operate the public access channels is analogous to a government license, a government contract, or a government-granted monopoly. But as the Court has long held, the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function. See, *e.g. San Francisco Arts & Athletics*, 483 U.S. at 543–544 (exclusive-use rights and corporate charters); *Blum*, 457 U.S. at 1011 (licenses); *Rendell-Baker*, 457 U.S. at 840–841 (contracts); *Polk County*, 454 U.S. at 319, n. 9, and 320–322 (law licenses); *Jackson*, 419 U.S. at 351–352 (electric monopolies); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 120–121 (1973) (broadcast licenses); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176–177 (1972) (liquor licenses); cf. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 638–639 (1819) (corporate charters). The same principle applies if the government funds or subsidizes a private entity. See *Blum*, 457 U.S. at 1011; *Rendell–Baker*, 457 U.S. at 840.

Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities. As this Court's many state-action

cases amply demonstrate, that is not the law. Here, therefore, the City's designation of MNN to operate the public access channels on Time Warner's cable system does not make MNN a state actor.

So, too, New York State's extensive regulation of MNN's operation of the public access channels does not make MNN a state actor. Under the State's regulations, air time on the public access channels must be free, and programming must be aired on a first-come, first-served basis. Those regulations restrict MNN's editorial discretion and in effect require MNN to operate almost like a common carrier. But under this Court's cases, those restrictions do not render MNN a state actor.

In *Jackson v. Metropolitan Edison Co.*, the leading case on point, the Court stated that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." In that case, the Court held that "a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory," was not a state actor. The Court explained that the "mere existence" of a "regulatory scheme"—even if "extensive and detailed"—did not render the utility a state actor. Nor did it matter whether the State had authorized the utility to provide electric service to the community, or whether the utility was the only entity providing electric service to much of that community.

This case closely parallels *Jackson*. Like the electric utility in *Jackson*, MNN is "a heavily regulated, privately owned" entity. As in *Jackson*, the regulations do not transform the regulated private entity into a state actor.

Put simply, being regulated by the State does not make one a state actor. See *Sullivan*, 526 U.S. at 52; *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 841–842; *Jackson*, 419 U.S. at 350; *Moose Lodge*, 407 U.S. at 176–177. As the Court's cases have explained, the "being heavily regulated makes you a state actor" theory of state action is entirely circular and would significantly endanger individual liberty and private enterprise. The theory would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms. * * * *

In sum, we conclude that MNN is not subject to First Amendment constraints on how it exercises its editorial discretion with respect to the public access channels. To be sure, MNN is subject to state-law constraints on its editorial discretion (assuming those state laws do not violate a federal statute or the Constitution). If MNN violates those state laws, or violates any applicable contracts, MNN could perhaps face state-law sanctions or liability of some kind. We of course take no position on any potential state-law questions. We simply conclude that MNN, as a private actor, is not subject to First Amendment constraints on how it exercises editorial discretion over the speech and speakers on its public access channels.

III.

Perhaps recognizing the problem with their argument that MNN is a state actor under ordinary state-action principles applicable to private entities and private property, the producers alternatively contend that the public access channels are actually the property of New York City, not the property of Time Warner or MNN. On this theory, the producers say (and the dissent agrees) that MNN is in essence simply managing government property on behalf of New York City.

The short answer to that argument is that the public access channels are not the property of New York City. Nothing in the record here suggests that a government (federal, state, or city) owns or leases either the cable system or the public access channels at issue here. Both Time Warner and MNN are private entities. Time Warner is the cable operator, and it owns its cable network, which contains the public access channels. MNN operates those public access channels with its own facilities and equipment. The City does not own or lease the public access channels, and the City does not possess a formal easement or other property interest in those channels. * * * *

It is true that the City has allowed the cable operator, Time Warner, to lay cable along public rights-of-way in the City. But Time Warner's access to public rights-of-way does not alter the state-action analysis. * * * * But the same is true for utility providers, such as the electric utility in *Jackson*. Put simply, a private entity's permission from government to use public rights-of-way does not render that private entity a state actor.

Having said all that, our point here should not be read too broadly. Under the laws in certain States, including New York, a local government may decide to itself operate the public access channels on a local cable system (as many local governments in New York State and around the country already do), or could take appropriate steps to obtain a property interest in the public access channels. Depending on the circumstances, the First Amendment might then constrain the local government's operation of the public access channels. We decide only the case before us in light of the record before us.

* * *

[star ellipses in original]

It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case.

MNN is a private entity that operates public access channels on a cable system. Operating public access channels on a cable system is not a traditional, exclusive public function. 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. Under the text of the Constitution and our precedents, MNN is not a state actor subject to the First Amendment. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

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.

B

Years ago, New York City (no longer a party to this suit) and Time Warner Entertainment Company (never a party to this suit) entered into a cable-franchise agreement. Time Warner received a cable franchise; the City received public-access channels. The agreement also provided that the public-access channels would be operated by an independent, nonprofit corporation chosen by the Manhattan borough president. But the City, as the practice of other New York municipalities confirms, could have instead chosen to run the channels itself.

MNN is the independent nonprofit that the borough president appointed to run the channels; indeed, MNN appears to have been incorporated in 1991 for that precise purpose, with seven initial board members selected by the borough president (though only two thus selected today). The City arranged for MNN to receive startup capital from Time Warner and to be funded through franchise fees from Time Warner and other Manhattan cable franchisees. As the borough president announced upon MNN's formation in

1991, MNN's "central charge is to administer and manage all the public access channels of the cable television systems in Manhattan."

As relevant here, respondents DeeDee Halleck and Jesus Papoleto Melendez sued MNN in U.S. District Court for the Southern District of New York * * * and alleged that the public-access channels, "[r]equired by state regulation and [the] local franchise agreements," are "a designated public forum of unlimited character"; that the City had "delegated control of that public forum to MNN"; and that MNN had, in turn, engaged in viewpoint discrimination in violation of respondents' First Amendment rights. * * * *

II

I would affirm the judgment below. * * * * 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.

A

When a person alleges a violation of the right to free speech, courts generally must consider not only what was said but also in what context it was said.

[Sotomayor's discusses viewpoint discrimination and public forum doctrine under the First Amendment]

[Sotomayor discusses and concludes that public access channels represent a type of property interest of the government that subjects them to the requirements of the First Amendment.]

B

If New York's public-access channels are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent. When MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor * * * *

This conclusion follows from the Court's decision in *West v. Atkins*, 487 U.S. 42 (1988). The Court in *West* unanimously held that a doctor hired to provide medical care to state prisoners was a state actor [subject to the Constitution]. Each State must provide medical care to prisoners, the Court explained, and when a State hires a private doctor to do that job, the doctor becomes a state actor, "clothed with the authority of state law." If a doctor hired by the State abuses his role, the harm is "caused, in the sense relevant for state-action inquiry," by the State's having incarcerated the prisoner and put his medical care in that doctor's hands. * * * *

West resolves this case. Although the settings are different, the legal features are the same: When a government (1) makes a choice that triggers constitutional obligations, and then (2) contracts out those constitutional responsibilities to a private entity, that entity —in agreeing to take on the job—becomes a state actor [for purposes of the Constitution].

Not all acts of governmental delegation necessarily trigger constitutional obligations, but this one did. * * * *

The City could have done the job itself, but it instead delegated that job to a private entity, MNN. MNN could have said no, but it said yes. (Indeed, it appears to exist entirely to do this job.) By accepting the job, MNN accepted the City's responsibilities. See *West*, 487 U. S., at 55. The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor.

III

The majority acknowledges that the First Amendment could apply when a local government either (1) has a property interest in public-access channels or (2) is more directly involved in administration of those channels than the City is here. And it emphasizes that it "decide[s] only the case before us in light of the record before us." These case-specific qualifiers sharply limit the immediate effect of the majority's decision, but that decision is still meaningfully wrong in two ways. First, the majority erroneously decides the property question against the plaintiffs as a matter of law. Second, and more fundamentally, the majority mistakes a case about the government choosing to hand off responsibility to an agent for a case about a private entity that simply enters a marketplace. * * * *

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.*, 419 U. S. 345 (1974), which is a paradigmatic example of a line of cases that reject [constitutional] liability for private actors that simply operate against a regulatory backdrop. *Jackson* emphasized that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." * * * *

The *Jackson* line of cases is inapposite here. MNN is not a private entity that simply ventured into the marketplace. * * * * 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.

The majority also relies on the Court's statements that its "public function" test requires that a function have been "traditionally and exclusively performed" by the government. (emphasis deleted). Properly understood, that rule cabins liability in cases such as *Jackson* in which a private actor ventures of its own accord into territory shared (or regulated) by the government (*e.g.*, by opening a power company or a shopping center). The Court made clear in *West* that the rule did not reach further, explaining that "the fact that a state employee's role parallels one in the private sector" does not preclude a finding of state action.

When the government hires an agent, in other words, the question is not whether it hired the agent to do something that can be done in the private marketplace too. If that were the key question, the doctor in *West* would not have been a state actor. Nobody thinks that orthopedics is a function "traditionally exclusively reserved to the State."

The majority consigns *West* to a footnote, asserting that its "scenario is not present here because the government has no [constitutional] obligation to operate public access channels." The majority suggests that *West* is different because "the State was constitutionally obligated to provide medical care to prison inmates." But what the majority ignores is that the State in *West* had no constitutional obligation to open the prison or incarcerate the prisoner in the first place; the obligation to provide medical care arose when it made those prior choices.

The City had a comparable constitutional obligation here—one brought about by its own choices, made against a state-law backdrop. The City, of course, had no constitutional obligation to award a cable franchise or to operate public-access channels. But once the City did award a cable franchise, New York law required the City to obtain public-access channels, and to open them up as a public forum. That is when the City's obligation to act in accordance with the First Amendment with respect to the channels arose. That is why, when the City handed the administration of that forum off to an agent, the Constitution followed.

* * * * But two dangers lurk here regardless. On the one hand, if the City's decision to outsource the channels to a private entity did render the First Amendment irrelevant, there would be substantial cause to worry about the potential abuses that could follow. Can a state university evade the First Amendment by hiring a nonprofit to apportion funding to student groups? Can a city do the same by appointing a corporation to run a municipal theater? What about its parks?

On the other hand, the majority hastens to qualify its decision and to cabin it to the specific facts of this case. Those are prudent limitations. Even so, the majority's focus on *Jackson* still risks sowing confusion among the lower courts about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution.

In any event, there should be no confusion here. MNN is not a private entity that ventured into the marketplace and found itself subject to government regulation. It was asked to do a job by the government and compensated accordingly. If it does not want to do that job anymore, it can stop (subject, like any other entity, to its contractual obligations). But as long as MNN continues to wield the power it was given by the government, it stands in the government's shoes and must abide by the First Amendment like any other government actor.

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. I respectfully dissent.

Check Your Understanding

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VI. Reconsidering The *Civil Rights Cases*

The Civil Rights Cases

109 U.S. 3 (1883)

(Consolidating: *U.S. v Stanley; U.S. v Ryan; U.S. v Nichols; U.S. v Singleton; Robinson and wife v Memphis & Charleston Railroad Company*)

Bradley, J., delivered the Opinion of the Court in which Waite, C.J., Miller, Field, Woods, Matthews, Gray, and Blatchford, JJ, joined. Harlan, J., filed a dissenting opinion.

{from the Court's Syllabus}:

These cases were all founded on the first and second sections of the Act of Congress known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco, and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre 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.

The case of Robinson and wife against the Memphis & Charleston R.R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee to recover the penalty of five hundred dollars given by the second section of the act, and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. * * * *

The Stanley, Ryan, Nichols, and Singleton cases were submitted together by the solicitor general at the last term of court, on the 7th day of November, 1882. There were no appearances, and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 9th day of March, 1883.

Mr. Justice Bradley delivered the opinion of the Court.

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

SEC. 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, theatres, 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 offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State:

And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

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 power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

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 declares that:

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

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws 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. * * * *

[U]ntil 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. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or

State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not 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, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. 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. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that 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.

* * * * [I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must

assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

* * * * [I]t is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

* * * * But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares “that 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;” and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter’s consent. Should any such servitudes be imposed by a state law, there can be no doubt that

the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, Would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to

another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

* * * * After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It 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. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

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. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth and Fifteenth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the United States v. Michael Ryan, and of Richard A. Robinson and Wife v. The Memphis Charleston Railroad Company, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.

And it is so ordered.

Mr. Justice Harlan dissenting.

The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that 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 court adjudges, I think erroneously, that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.

* * * * The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? * * * *

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. * * * * I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

* * * * I am of the opinion that such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and, consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment. Much that has been said as to the power of Congress under the Thirteenth Amendment is applicable to this branch of the discussion, and will not be repeated.

* * * * The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside"—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, and of their respective States. * * * *

It is, therefore, an essential inquiry what, if any, right, privilege or immunity was given, by the nation, to colored persons, when they were made citizens of the State in which they reside? Did the constitutional grant of State citizenship to that race, of its own force, invest them with any rights, privileges and immunities whatever? That they became entitled, upon the adoption of the Fourteenth Amendment, "to all privileges and immunities of citizens in the several States," within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the Constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free republican government, such as are "common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens." * * * *

But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship? With what rights, privileges, or immunities did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and

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

'In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in Ex parte Virginia, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.

But the court says that Congress did not, in the act of 1866, assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community. I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for even upon grounds of race, no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him. What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race. The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social rights. The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed. Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house, or court-room, was an invasion of the social rights of white persons who may frequent such places. And yet, such a suggestion would be quite as sound in law—I say it with all respect—as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.

* * * * My brethren say, that 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. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the

latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

Check Your Understanding

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Further Your Understanding

CALI Lesson: State Action

CALI, The Center for Assisted Legal Instruction, has a lesson designed to further your understanding of the constitutional doctrine, theories, and analysis of state action. The above-linked lesson reviews the basic principles and history of state action doctrine, considers the development of the doctrine in the United States Supreme Court, and examines the Court's most recent cases. It also considers state action and social media, an issue that has not yet reached the United States Supreme Court.

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1.2: CHAPTER TWO- Introduction to Constitutional Interpretation and Judicial Review

I. A Basic Constitutional Timeline

Depending on our individual histories, we each encounter the course Liberty, Equality, and Due Process with different understandings of American history, political philosophy, government, or social justice.

Here is a basic timeline of texts that might be helpful:

The Declaration of Independence, 1776

Authored by Thomas Jefferson, the Declaration's most famous passage is this:

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. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence also includes a list of grievances regarding Acts of King George III against the "American" colonies; some of these reappear as specific guarantees in the Constitution, for example, the grievance "quartering large bodies of armed troops among us" is echoed in the Third Amendment.

One of the grievances in the draft Declaration by Jefferson is an explicit attack on slavery and the "slave trade": "He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined to keep open a market where Men should be bought & sold . . . ."

The Articles of Confederation and Perpetual Union, drafted 1776, ratified by 13 states 1781.

This is the precursor to the United States Constitution, sometimes known as the United States' "first constitution" or "failed constitution," usually simply called the "Articles of Confederation." The generally accepted rationale for the failure of the Articles of Confederation was that the national government was too weak when compared with state governments.

The United States Constitution, including the Bill of Rights, drafted 1787; became effective 1789.

In addition to the text of the Constitution, there are three textual sources that are often cited in historical sources:

The Debates at the Constitutional Convention; The Anti-Federalist Papers (arguments circulated to the states during the ratification process generally against the Constitution); The Federalist Papers (arguments circulated to the states during the ratification process in favor of the Constitution; generally anonymous but attributed and many still influential).

The Constitution structures the federal government into three parts: Article I establishes and concerns the Legislative branch ("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." It provides specific enumerated powers to Congress, specific limitations, and provides limitations on the powers of States.)

Article II establishes and concerns the Executive branch (It establishes the office of President and Vice President, the manner of election by "Electors," specific roles of the President, and impeachment).

Article III establishes and concerns the Judicial Branch (It provides that the "judicial power" is vested in one supreme court and such inferior courts as Congress may establish, extending to "all Cases, in Law and Equity, arising under this Constitution," and in other instances.)

Articles IV – VII also structure the government.

Article IV regards relations among the states and among "citizens" of each state; Article V pertains to the mode of amendment;

Article VI includes the Supremacy Clause declaring that the Constitution (and the laws made pursuant to the Constitution) are the supreme "Law of the Land");

Article VII outlines the process for ratification of the Constitution.

The Amendments to the Constitution as originally proposed were twelve; only ten passed and these are known as the Bill of Rights.

The "Reconstruction Amendments," after the Civil War (1861-1865)

The Thirteenth Amendment (abolition of slavery) (1865)

The Fourteenth Amendment (Citizenship Clause, "No state shall"; Equal Protection, Due Process, Privileges or Immunities) (1868)

The Fifteenth Amendment (voting shall not be deprived on basis of race) (1870)

II. Judicial Review

Judicial review—the power of the judiciary to declare acts of a usually elected legislative or executive body void as unconstitutional—is both a cornerstone and a divisive subject of United States constitutional law. Judicial review is a feature of most, but not all, constitutional democracies in the world, as well as a feature of many nations that are considered less than democratic. In the so-called American model, general courts hear constitutional as well as nonconstitutional issues. In the so-called European model, there is one or more special "Constitutional Court" devoted exclusively to hearing cases challenging the constitutionality of government laws or acts.

In addition to the judicial power to declare legislative (or executive) acts invalid, the question of judicial independence is important. In the federal system, judges are not elected but are nominated by the President and confirmed by the Senate, adding to the anti-democratic critique. Further, in many nations, the term for judges is a definite one, such as ten or twelve years. In the United States Constitution, Article III § 1 provides that federal judges "shall hold their Offices during good Behaviour" which has meant life-tenure, although subject to impeachment. The central concern is that judges be able to exercise independent judgment without fear of reprisal or losing their positions. Simply put, if a judge can be terminated by the Executive, she may be more cautious in ruling that a law signed by the Executive is invalid.

In the United States, *Marbury v. Madison* (1803) is considered the landmark case that "established" judicial review and is the case that has "tortured generations of law students" as they confront Constitutional Law and the issue of judicial review. It is in virtually every Constitutional Law Casebook in the United States, including this one.

Marbury v. Madison

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

Mr. Chief Justice Marshall delivered the opinion of the Court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia. * * * * The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the Court is founded.

In the order in which the Court has viewed this subject, 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? * * * *{The Court considered the nomination process and whether it had been followed.} To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

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. In Great Britain, the King himself is sued in the

respectful form of a petition, and he never fails to comply with the judgment of his court. * * * *

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

{The Court ultimately concluded that Marbury} having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

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.

* * * * {The Court ultimately concluded that} 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."

{This is from Section 13 of the 1789 Judiciary Act, reproduced in the Notes.}The Secretary of State, being a person, holding an office under the authority of the United States, is precisely within the letter of the description, and if this Court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

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

In the distribution of this power it is declared that

The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.

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

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

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

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

If the solicitude of the Convention respecting our peace with foreign powers induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases if no further restriction on the powers of Congress had been intended. That they should have appellate

jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction unless the words be deemed exclusive of original jurisdiction.

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.

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

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

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that 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.

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

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

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

Between these 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.

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

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

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

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

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

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

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

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

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

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

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

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

The rule must be discharged.

Check Your Understanding

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Notes

1. *Marbury* is not an easy case, in part because of Chief Justice Marshall's style. There are many issues in the case and the order in which they are presented is not necessarily logical. But the central feature of the case is the Supreme Court's power, including the "power" that Congress sought to confer on the Court by § 13 of the Judiciary Act of 1789:

And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after 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 courts appointed, or persons holding office, under the authority of the United States.

Be prepared to articulate the Court's holding regarding the statute.

2. While Chief Justice Marshall alludes to the "peculiar delicacy" of the case, that is not apparent from the opinion. The underlying events start with the election of 1800, a contentious election in the early history of the United States, marking the rise of political

parties. The Federalist party had been in power, led by John Adams who had lost his re-election for President to Thomas Jefferson, a Republican-Democrat.

John Marshall served as the Secretary of State under Adams. When John Jay declined an offer to resume his position as Chief Justice, Adams nominated Marshall to be the new Chief Justice of the United States Supreme Court. Marshall assumed his position on the Supreme Court on February 4, 1801, and continued to simultaneously serve as Adams' Secretary of State until March 4, 1801, when Thomas Jefferson was inaugurated as President.

During Adams' last days in office, he worked to fill the numerous new judicial vacancies created by the lame-duck Congress. Many commentators believe the Federalist's goal was to take control of the judicial branch, having lost power in the executive and legislative branches.

Marbury filed his original action before the United States Supreme Court in December 1801. In those early days of the Court, the docket was small and the Court should have been able to decide the case promptly. However, the new Congress had abolished the June and December 1802 Terms of the Court and had repealed the Judiciary Act of 1801, which returned the Supreme Court Justices to the busy task of "circuit-riding." Thus, the Court did not hear *Marbury v. Madison* until 1803.

3. Scholars have argued that *Marbury v. Madison* did not "establish" judicial review. For example, William Michael Treanor, in *Judicial Review Before* Marbury, 58 Stan.L.Rev. 455, 457-58 (2005), examines thirty-one pre-*Marbury* cases in which a statute was invalidated and seven additional cases in which, although the statute was upheld, one judge concluded that the statute was unconstitutional. The United States Supreme Court itself had previously invalidated a Virginia statute in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), known as the British Debt Case, as inconsistent with the Treaty of Paris. (The Virginia statute had sought to nullify Revolutionary War debts which the treaty had agreed were enforceable). In Federalist No. 78, attributed to Alexander Hamilton, there is an argument for judicial review including the proposition that the United States Supreme Court would be the ultimate arbiter of the Constitution. Note that in *Marbury*, Chief Justice Marshall implies that judicial review is an inherent feature of the judiciary.

Nevertheless, *Marbury* is generally cited as the landmark case establishing judicial review. As such, it could be cited by courts whenever they are considering the constitutionality of government actions, but in fact it is cited only occasionally. Consider what circumstances cause a court (or a litigant) to cite *Marbury v. Madison*.

Further Your Understanding

CALI Lesson: *Marbury v. Madison*

CALI, The Center for Assisted Legal Instruction, has a lesson designed to assist and further your understanding of *Marbury v. Madison* and its relevance. The above-linked lesson includes 25 questions and should take 30 – 45 minutes to complete.

III. Constitutional Interpretation

The question of how courts should interpret the constitution – – – and the question of how we might understand judicial opinions and construct legal arguments – – – is a vexed one. There are many types of constitutional theories, but below is a broad outline.

A. Originalist Theories

Originalist theories generally look to the "framers" of the Constitution to derive meaning. Different types of originalist theories include:

Textualism: Centers the words of the Constitution. Questions include whether the specific phrase has a plain meaning. Broader questions include inquiry into the Constitution as a whole: surrounding content; repeat of the words elsewhere in the Constitution; absent words.

Original intent: Focuses on the framers of the specific phrase. What did they intend.

Original meaning: Broader than original intent, considers what persons at the time would have understood by the specific phrase.

Original purpose: Broader than original intent, considers what the framers of the "ultimately" meant, even if they did not have a specific intent that governs the problem under consideration.

B. Pragmatic Theories

Pragmatic theories, sometimes also called legal process theories, generally consider the place of the courts in a democracy. The two major types of this theory take somewhat opposing perspectives:

Representation-Reinforcement: Championed by John Hart Ely in his famous work Democracy and Distrust, this theory focuses on the role of the unelected federal judicial branch in a democracy. It posits that the role of the courts should be to "reinforce" representative democracy by preventing a tyranny of the majority and thus, ultimately, to forestall violent uprisings by minorities.

Passive Virtues: Championed by Alexander Bickel in his famous work The Least Dangerous Branch, this theory also focuses on the role of the unelected federal judiciary in a democracy. However, it posits that the role of the courts should be to exercise restraint and allow the democratic process to "work itself out" lest the judiciary itself be compromised. Courts should not decide controversies too early and should always decide controversies on the narrowest grounds possible.

C. Evolutive Theories

Evolutive theories generally posit that the Constitution should "evolve." Under this view, the past may be a guide but should not be determinative. Types of evolutive theory include:

Living Constitutionalism: This theory posits that constitutional meaning evolves and it is subject to reinterpretation by each generation. Justice Stephen Breyer has been a strong advocate of this theory, most notably in his 2005 book, Active Liberty: Interpreting Our Democratic Constitution.

Critical Theories: Like living constitutionalism, these theories advocate for a progressive interpretation, but often from a specific vantage point. For example, Critical Race Theory would advocate that the Constitution enshrined slavery and white supremacy, so present interpretive strategies should attempt to reject that legacy. Similarly, Critical Feminist Theory would advocate that the Constitution erases women and preserves patriarchy, so present interpretive strategies should attempt to reject that legacy. There are also queer, dis/ability, class-based, Native, and other theories.

Popular Constitutionalism: This theory calls for de-centering the judiciary and advocates recognizing how "average people" today understand and enact constitutional norms.

Check Your Understanding

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Notes

1. The late Justice Antonin Scalia, well-known as an orginalist, and Justice Stephen Breyer, advocating living constitutionalism both wrote books advocating their positions and together participated in many public conversations and debates about their respective constitutional interpretative philosophies.

2. Regarding originalist interpretative strategies, consider what type of documentary evidence would be used in making arguments about intent, meaning, and purpose.

3. Judicial activism and judicial restraint overlap with constitutional theories, but theories do not necessarily coincide with "activist" or "restrained" outcomes.

At its most basic, an activist constitutional decision elevates a judicial determination over a democratic one: it declares the "state action" unconstitutional. Likewise, at its most basic, when a court practices judicial restraint, it allows the democratically-enacted government action to stand.

Note also that activist/restrained decisions do not necessarily coincide with "liberal" or "conservative" outcomes.

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1.3: CHAPTER THREE- Slavery and Racial Equality

I. Constitutional Equality Before the Reconstruction Amendments

Recall that although the notion of equality is in the Declaration of Independence, it is not in the Articles of Confederation or the Constitution before the Reconstruction Amendments.

Despite the Constitution's Preamble, "We the People," generally speaking, people who counted as "people" in the Constitution were white and male.

As for women, despite Abigail Adams' well-known letter to her husband John Adams at the Continental Congress in 1776 to "Remember the Ladies," the Declaration of Independence, Articles of Confederation, and pre-Reconstruction Constitution do not address sex/gender, implicitly assuming a male political body despite a population of roughly 50% women.

As for Native Americans, the Constitution recognizes the sovereignty of Indian Tribes, explicitly in Article I, § 8, cl. 3, which gives Congress (rather than states) the power to "regulate commerce" with "the Indian Tribes" and implicitly in Article VI, the Supremacy Clause, which declares the Constitution supreme, also provides that treaties entered into by the United States "shall be the supreme Law of the Land." (In 1789, there were at least 9 treaties with Indian nations.)

Most contentious in the Constitution was the status of enslaved persons. The 1789 Constitution enshrined slavery, albeit without ever using the term. Despite the absence of the word, the so-called compromise among the framers of the Constitution regarding slavery appears in a number of provisions.

One of most well-known compromises also implicates women and Native Americans, as well as federal-state relations (federalism) and democracy (another term that does not appear in the Constitution).

Article I § 2 cl. 3, regarding representation in the House of Representatives of Congress, provides:

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.

This provision itself was itself a compromise regarding how representation among the states in the House of Representatives should be apportioned. The competing proposition was that representation should be linked to commerce or taxes paid to the federal government; this would essentially be representation of states based on their wealth.

Once it was decided it should be people rather than money, however, the question was which people should be counted.

The initial proposal was that population should be "the whole number of white & other free Citizens and inhabitants of *every age sex & condition* including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians paying taxes, in each state." Supposedly for stylistic reasons, "every age sex & condition" was omitted. As applied, women (and children) were counted as part of the population.

The provision explicitly excluded "Indians not taxed" from being counted in the population to be represented in the House of Representatives of Congress. This assumes that Indians who did not reside on sovereign tribal lands would pay taxes and be part of the population.

The inclusion of all persons who were free (even if not white) or indentured for a term of years in the population calculation recognized both free people of color and all indentured servants. Note that indentured servants were usually Europeans who had obtained passage to the United States. Sometimes this passage was as punishment for a crime or as a release from debtors' prison. Sometimes persons bought passage for economic advancement or personal reasons; sometimes persons were assigned passage by their families. Indentured servants were to work without pay for a set period, often 7 years, although the term could be extended for infractions including minor crimes, inadequate service, or pregnancy. During the time of servitude one could not "quit," but one was considered a servant and not property (chattel) and after the term ended one was a free person.

The "three fifths of all other Persons" portion of Article I § 2 cl. 3 is the most infamous. "All other persons" meant enslaved persons. In general, the Northern states in which slavery was minimal wanted slaves to not count as persons; the Southern states in which enslaved persons were a majority of the population wanted slaves to be counted as full persons. This may seem paradoxical,

but what was at stake was how large the number of representatives in Congress would be. The compromise was that each enslaved person would be counted as “three-fifths” of a person when calculating the total population as a basis for representation.

Gouverneur Morris (who despite his first name was never governor but was later a United States Senator from New York) famously excoriated such a compromise during the Constitutional Convention: “Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?”

However, the presumptive author of Federalist Paper No. 54 James Madison argued that the Constitution was correct to view “our slaves” as possessing “the mixed character of persons and of property.” Madison contended that this was “in fact their true character,” although it was not necessarily a natural one: “it is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is disputed them in the computation of numbers; and it is admitted, that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.”

In addition to Article I § 2 cl. 3, several other provisions in the 1789 Constitution recognized slavery, again without using the term.

First, **Article I, § 9, cl. 1** and **Article V** guaranteed the importation of slaves into the United States until 1808.

Article I, § 9, cl. 1, prohibited Congress from acting. It provided that “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.”

Article V, regarding amendments to the Constitution, exempted Article I, § 9, cl. 1 from the amendment process until then.

Note that Congress did pass the Act Prohibiting Importation of Slaves of 1807, signed (and championed) by President Thomas Jefferson, which became effective January 1, 1808.

Second, **Article IV** mandated the recognition of slave status by all states. Article IV is best known for requiring states to give “full faith and credit” to the proceedings of other states and to grant “all privileges and immunities” to citizens of other states, but it also contained the so-called Fugitive Slave Clause. It provided that: “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.”

Lastly, and perhaps most obliquely, the **Article I, § 8 powers** of Congress include “calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” implying the possibility of slave or other rebellions.

II. Litigating Slavery and Equality Before the Reconstruction Amendments

Prigg v. Pennsylvania

41 U.S. (16 Pet.) 539 (1842)

Mr. Justice Story delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Pennsylvania . . . in a case involving the construction of the Constitution and laws of the United States.

The facts are briefly these: The plaintiff in error {Edward Prigg} was indicted in * * * * York County {Pennsylvania} for having, with force and violence, taken and carried away from that county, to the State of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her, as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March, 1826. That statute, in the first section, in substance provides that, if any person or persons shall, from and after the passing of the act, by force and violence, take and carry away, or cause to be taken and carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt to take, carry away or seduce, any negro or mulatto from any part of that Commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever, every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars, and moreover shall be

sentenced to undergo servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years, and shall be confined and kept to hard labor, &c.

There are many other provisions in the statute, which is recited at large in the record but to which it is in our view unnecessary to advert upon the present occasion.

The plaintiff in error pleaded not guilty to the indictment, and, at the trial, the jury found a special verdict which in substance states that the negro woman, Margaret Morgan, was a slave for life, and held to labor and service under and according to the laws of Maryland, to a certain Margaret Ashmore, a citizen of Maryland; that the slave escaped and fled from Maryland into Pennsylvania in 1832; that the plaintiff in error, being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837 caused the said negro woman to be taken and apprehended as a fugitive from labor by a state constable under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognizance of the case; and thereupon the plaintiff in error did remove, take and carry away the said negro woman and her children out of Pennsylvania into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore. The special verdict further finds that one of the children was born in Pennsylvania more than a year after the said negro woman had fled and escaped from Maryland.

Upon this special verdict, the Court of Oyer and Terminer of York County adjudged that the plaintiff in error was guilty of the offense charged in the indictment. A writ of error was brought from that judgment to the Supreme Court of Pennsylvania, where the judgment was, *pro forma*, affirmed. From this latter judgment, the present writ of error has been brought to this Court. * * * *

The question arising in the case as to the constitutionality of the statute of Pennsylvania, has been most elaborately argued at the bar. The counsel for the plaintiff in error have contended that the statute of Pennsylvania is unconstitutional, first, because Congress has the exclusive power of legislation upon the subject matter under the Constitution of the United States and under the act of the 12th of February 1793, ch. 51 {the federal Fugitive Slave Act} which was passed in pursuance thereof; secondly, that, if this power is not exclusive in Congress, still the concurrent power of the state legislatures is suspended by the actual exercise of the power of Congress; and thirdly, that, if not suspended, still the statute of Pennsylvania, in all its provisions applicable to this case, is in direct collision with the act of Congress, and therefore, is unconstitutional and void. The counsel for Pennsylvania maintain the negative of all those points.

Few questions which have ever come before this Court involve more delicate and important considerations, and few upon which the public at large may be presumed to feel a more profound and pervading interest. We have accordingly given them our most deliberate examination, and it has become my duty to state the result to which we have arrived, and the reasoning by which it is supported.

Before, however, we proceed to the points more immediately before us, it may be well, in order to clear the case of difficulty, to say that, in the exposition of this part of the Constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will indeed probably be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

There are two clauses in the Constitution upon the subject of fugitives, which stands in juxtaposition with each other and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth Article, and are in the following words:

“A person charged in any State with treason, felony, or other crime who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

"No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

The last clause is that the true interpretation whereof is directly in judgment before us. Historically, it is well known that the object of this clause was to secure to the citizens of the slave-holding 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. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding States, and indeed was so vital to the preservation of their domestic interests and institutions that it cannot be doubted that it constituted a fundamental article without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

By the general law of nations, no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. * * * It is manifest from this consideration that, if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters—a course which would have created the most bitter animosities and engendered perpetual strife between the different States. The clause was therefore of the last importance to the safety and security of the southern States, and could not have been surrendered by them, without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it—a proof at once of its intrinsic and practical necessity.

How then are we to interpret the language of the clause? The true answer is in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it. * * * The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave which no state law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labor in consequence of any state law or regulation. Now certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said that any state law or state regulation which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave and the immediate command of his service and labor operates *pro tanto* a discharge of the slave therefrom. The question can never be how much the slave is discharged from, but whether he is discharged from any, by the natural or necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive and absolute right.

We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein, and we have no right to insert any which is not expressed and cannot be fairly implied. Especially are we estopped from so doing when the clause puts the right to the service or labor upon the same ground, and to the same extent, in every other State as in the State from which the slave escaped and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him, as property, and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject. * * * *

Upon this ground, 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 whenever he can do it without any breach of the peace or any illegal violence. In this sense and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

But the clause of the Constitution does not stop here, nor, indeed, consistently with its professed objects, could it do so. * * * And this leads us to the consideration of the other part of the clause, which implies at once a guarantee and duty. It says, "but he [the slave] shall be delivered up on claim of the party to whom such service or labor may be due." {note: brackets in original} Now we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made! What is a claim? It is, in a

just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. * * *

The slave is to be delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful recaption or delivery? When and under what circumstances shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or otherwise, while the slave, in possession of the owner, is *in transitu* to the State from which he fled?

These and many other questions will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the Constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be that, where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the National Constitution, and not in that of any State. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them, and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the National Government, nowhere delegated or entrusted to them by the Constitution. On the contrary, the natural, if not the necessary, conclusion is, that the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. * * * *

The remaining question is whether the power of legislation upon this subject is exclusive in the National Government or concurrent in the States until it is exercised by Congress. In our opinion, it is exclusive * * * *

It is scarcely conceivable that the slaveholding States would have been satisfied with leaving to the legislation of the non-slaveholding States a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner. * * * *

These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusive in Congress. To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the States, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States and owes its whole efficacy thereto. We entertain no doubt whatsoever that the States, in virtue of their general police power, possesses full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course, and, in many cases, the operations of this police power, although designed generally for other purposes—for protection, safety and peace of the State—may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same.

Upon these grounds, we are of opinion that the act of Pennsylvania upon which this indictment is founded is unconstitutional and void. It purports to punish as a public offense against that State the very act of seizing and removing a slave by his master which the Constitution of the United States was designed to justify and uphold. The special verdict finds this fact, and the state courts have rendered judgment against the plaintiff in error upon that verdict. That judgment must, therefore, be reversed, and the cause remanded to the Supreme Court of Pennsylvania with directions to carry into effect the judgment of this Court rendered upon the special verdict, in favor of the plaintiff in error.

{The separate concurring opinions of Chief Justice Taney, and Justices Thompson, Wayne, Daniel, and McLean are omitted.}

Scott v. Sandford

60 US (19 How.) 393 (1857)

{Dred Scott, his wife Harriet, and his daughters, Eliza and Lizzie, were slaves conveyed as property to the defendant, John Sanford, whose name is mistakenly spelled in the case with an extra “d.” In 1834, Scott’s former slaveowner, an Army surgeon named Emerson, had taken him from Missouri, where slavery was legal, to Illinois, where slavery was not legal. They then traveled to Fort Snelling in now-Minnesota (Wisconsin Territory) which had been part Louisiana Purchase, and was north of 36° 30’, an area in which slavery was forbidden by the Missouri Compromise, codified as Act of March 6, 1820, 3 Stat. 545. Dred Scott had married Harriet Scott in Fort Snelling. There were also travels to Louisiana. Emerson brought them back to Missouri and then “sold and conveyed” the Scotts to Sanford. More specific facts from the Opinion are in the Notes.

Scott sued on behalf of himself and his family for freedom based on the argument that residence in a free state and free territory had conferred freedom. He won in a state trial court in Missouri, but the Missouri supreme court reversed. He then brought suit in federal court (the “plea in abatement”) against Sanford, who had moved to New York, on the basis of diversity jurisdiction, allowed in the Constitution by Art. III § 2, which requires that the lawsuit be “between Citizens of different States.” On a writ of error, from an adverse judgment, Dred Scott appealed to the Supreme Court.}

Mr. 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 {sic} by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word “citizen” is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. * * * *

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of

the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character. * * * * *

This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States while it remains a Territory and until it shall be admitted as one of the States of the Union. * * * *

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 that 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.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States, and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief, for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham,* reported in 10th Howard 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition as free or slave depended upon the laws of Kentucky when they were brought back into that State, and not of Ohio, and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status as free or slave depended on the laws of Missouri, and not of Illinois.

* * * * But whatever doubts or opinions may at one time have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant, and that the Circuit Court of the United States had no jurisdiction when, by the laws of the State, the plaintiff was a slave and not a citizen. * * * *

Mr. Justice Curtis, joined by Mr. Justice McLean, dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. * * * *

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution. Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. ***

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that, in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established. * * * *

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise act, and the grounds and conclusions announced in their opinion. Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had no jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions and, as I understand, acknowledged in this opinion of the majority of the court. * * * * Nor, in my judgment, will the position that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

Notes

1. The Court's opinion in what is often known as *The Dred Scott Case*, provides several renditions of the facts at various points, including this one:

The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

2. There is much legal commentary about the case. For example, Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How it Changed History*, 82 Chicago-Kent Law Review 3 (2006), recounts the decision and provides extensive background regarding the facts, including some speculation about the Scotts' decision to sue then (and not previously) as well as some discussion of the lawyers. As Finkelman also notes, the opinions were exceedingly lengthy for that point in history:

Each of the nine Justices on the Court wrote an opinion in the case: only one of a few times before the Civil War that this occurred. The opinions range in size from Justice Robert C. Grier's half-page concurrence to Justice Benjamin R. Curtis's seventy-page dissent. Chief Justice Taney's "Opinion of the Court" is fifty-four pages long. The nine opinions, along with a handful of pages summarizing the lawyers' arguments, consume 260 pages of *U.S. Reports.*

Finkelman also notes that while it is an "exaggeration" to say that *Dred Scott* "caused" the Civil War, surely it played a role in the timing of the war.

3. Would you say that *Dred Scott* is a "states' rights" opinion? What about *Prigg v. Pennsylvania*?

4. Justice Curtis, joined by Justice Mclean, dissenting in *Dred Scott*, stated that the majority was incorrect to believe that the Constitution was made exclusively for the white race. In support of their conclusion that the Constitution was not made exclusively for the white race, what do the dissenting justices rely upon?

III. The Reconstruction Amendments: full text

AMENDMENT XIII

Passed by Congress January 31, 1865. Ratified December 6, 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

Passed by Congress June 13, 1866. Ratified July 9, 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.

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

Section 5.

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

AMENDMENT XV

Passed by Congress February 26, 1869. Ratified February 3, 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 the power to enforce this article by appropriate legislation.

Check Your Understanding

Let's consider how the Reconstruction Amendments changed the Constitution and the Court's interpretations of it in *Prigg v. Pennsylvania* and *Scott v. Sandford*.

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IV. Early Cases Applying the Reconstruction Amendments

Strauder v. West Virginia

100 U.S. 303 (1880)

Mr. Justice Strong delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County in West Virginia, on the 20th of October, 1874, and, upon trial, was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that, at the trial in the State court, the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that,

by virtue of the laws of the State of West Virginia, no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that, by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man.

This petition was denied by the State court, and the cause was forced to trial.

* * * *The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1878, p. 102), and it is as follows:

All white male persons who are twenty-one year of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided.

* * * * In this court, several errors have been assigned, and the controlling question underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color, and, second, if he has such a right and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

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

The questions are important, for they demand a construction of the recent amendment of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments and the legislation of Congress under them. The Fourteenth Amendment ordains that

all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privilege 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.

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

power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them bar law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

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

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine—that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says,

The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter {The Magna Carta}.

It is also guarded by statutory enactments intended to make impossible what Mr. {Jeremy} Bentham called “packing juries.” It is well known that prejudices often exit against particular classes in the community which sway the judgment of jurors and which therefore operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship, the colored race became entitled to the equal protection of the laws of the States in which they resided, and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice, that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

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

has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

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

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State * * * {the Court then discussed the procedure of removal to federal court}.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed as also in overruling his challenge to the array of the jury and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio county, and it is

So ordered.

Field, J., dissenting opinion

I dissent from the judgment of the court in this case on the grounds stated in my opinion in *Ex parte Virginia* {see Note 1}, and Mr. Justice Clifford concurs with me.

Check Your Understanding

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Notes

1. *West Virginia v. Strauder* is the most famous of the three cases decided by the Court on March 1, 1880, each considering the unconstitutionality of the exclusion of Black males from juries as well as a federal statute providing remedies for such exclusion.

In *Ex Parte Virginia*, 100 U.S. 339 (1880), the Court had before it the indictment and arrest of a *judge* who “did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.” At issue in *Ex Parte Virginia* was whether the statute was within Congressional power under the Fourteenth Amendment. The Court, in an opinion again by Justice William Strong, held it was, concluding that the judge could be punished:

We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience. We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

In *Virginia v. Rives*, 100 U.S. 313 (1880), the question again involved the Congressional civil rights statute, but this time focused on a provision allowing for removal of a trial from state court to federal court when “any person who is denied or cannot enforce in the judicial tribunals of the State” “any right secured to him by any law providing for the equal civil rights of citizens of the United States.” Yet the Court, in an opinion again by Justice William Strong, found that the allegations of the defendants in the murder trial did not warrant removal:

The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick {Virginia} in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.

Can you discern the difference between *Strauder*, *Ex Parte Virginia*, and *Virginia v. Rives*? Comparing these three cases of 1880, is there a theoretical perspective familiar from our study of "state action doctrine," including the *Civil Rights Cases*, decided a few later in 1883?

2. Interestingly, West Virginia was formed when the western portions of Virginia, essentially seceded from Virginia when Virginia voted for the Ordinance of Secession from the United States and joined the Confederate States of America in 1861. West Virginia, whose proposed named had been Kanawha, was admitted to the Union as a state in June 1863, but only after it provided for the emancipation from slavery. After the Civil War ended and Virginia re-entered the United States, Virginia sued West Virginia regarding the creation of West Virginia and the specific inclusion of particular counties. Note that Article IV, Section 3, of the Constitution provides that "no new States shall be formed or erected within the Jurisdiction of any other State … without the Consent of the Legislatures of the States concerned as well as of the Congress." The United States Supreme Court ruled for West Virginia in *Virginia v. West Virginia*, 78 U.S. 39 (1871). Why might this history be illuminating given the facts of *Strauder*?

Plessy v. Ferguson

163 U.S. 537 (1896)

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts

that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to.

By the second section, it was enacted

that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. 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 constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughterhouse Cases*, to have been intended primarily to abolish slavery as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights Cases*, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley,

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.

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof are made citizens of the United States and of the State wherein they reside, and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

* * * *

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

* * * * The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia*, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon

juries was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. * * * *

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

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.

* * * *

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. * * * *

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan, dissenting.

By the Louisiana statute the validity of which is here involved, * * * * no colored person is permitted to occupy a seat in a coach assigned to white persons, nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act "white and colored races" necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the State regulates the use of a public highway by citizens of the United States solely upon the basis of race. * * * *

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

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

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty by declaring that

all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,

and that

no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it as declared by the Fifteenth Amendment that

the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy. * * * *

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. Everyone 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 a 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.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of

Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid and yet, upon grounds of public policy, may well be characterized as unreasonable. * * * *

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

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word “citizens” in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; * * * * The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. * * * *

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he objecting, and ought never to cease objecting, to the proposition that citizens of the white and black race can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

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.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. 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 anyone, nor atone for the wrong this day done.

* * * *

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

Check Your Understanding

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Notes

The Court's opinion in *Plessy v. Ferguson* is a betrayal of the Thirteenth and Fourteenth Amendments. It is a widely reviled decision that cements the end of Reconstruction and hobbles the potential for equality expressed in the Reconstruction Amendments.

Plessy is no longer "precedent." How did that happen as a legal matter? What are the legal strategies available to "dismantle" a case? This is the subject of the next chapter.

Understanding the process of the legal strategies used to dismantle *Plessy* starts with analyzing the decision itself. Answer the following questions about the opinion:

1. What is the standard of federal judicial review of the state statute used by the Court in *Plessy*?

2. What are the differing perspectives of the "purpose" of the state statute in the majority and dissenting opinions?

3. What is the Court's holding in *Plessy*?

4. How is the notion of "formal equality" deployed in *Plessy v. Ferguson* in both the majority and dissenting opinions?

5. What theoretical perspectives from the *Civil Rights Cases*, decided thirteen years earlier, are apparent in *Plessy v. Ferguson*?

6. Why does Harlan "allude to the Chinese race" in the dissent?

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1.4: CHAPTER FOUR- Race and Equal Protection – Part 1

I. Toward Strict Scrutiny

A. *Carolene Products*, Footnote Four

It has been called the "most famous footnote in Constitutional Law" and certainly it is the most famous one in Equal Protection doctrine. The case in which it occurred, ***United States v. Carolene Products Company,*** 304 U.S. 144 (1938), did not involve the Equal Protection Clause or racial classifications. Instead, at issue was a federal statute regulating the shipment of "filled milk" (skimmed milk to which nonmilk fat is added so that it may seem to be like whole milk or even cream). The challenges to the law were based on a lack of Congressional power under the Commerce Clause and a Due Process Clause of the Fifth Amendment violation.

In footnote four, Justice Harlan Stone wrote for the Court:

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.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, 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.

B. The Japanese Internment Cases

Hirabayashi v. United States

320 U.S. 81 (1943)

Mr. Chief Justice Stone delivered the opinion of the Court

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, 18 U.S.C. § 97a, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment. * * * *

{The evidence showed that} appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that for like reason he was away from his place of residence after 8:00 p.m. on May 9, 1942. The jury returned a verdict of guilty on both counts and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently.* * * *

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority. * * * *

{We therefore conclude that} Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. * * * *

In the critical days of March, 1942, the danger to our war production by sabotage and espionage in this area seems obvious. The German invasion of the Western European countries had given ample warning to the world of the menace of the 'fifth column.' Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan. No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. * * * *

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. {citations omitted}. We may assume that these considerations would be controlling

here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. * * * *

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant. * * * *

The conviction under the second count is without constitutional infirmity. Hence we have no occasion to review the conviction on the first count since, as already stated, the sentences on the two counts are to run concurrently and conviction on the second is sufficient to sustain the sentence. For this reason also it is unnecessary to consider the Government's argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.

Affirmed.

Mr. Justice Murphy, concurring

* * * * Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. * * * *

Korematsu v. United States

323 U.S. 214 (1944)

Mr. Justice Black delivered the opinion of the Court

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question

was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

* * * * {In *Hirabayashi*, it was argued that} to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas. * * * *

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps, with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that, at that time, these actions were unjustified.

Affirmed.

Mr. Justice Frankfurter, concurring.

* * * * * To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Mr. Justice Roberts, dissenting

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night, as was *Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. * * * *

Mr. Justice Murphy, dissenting

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional

power," and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. * * * *

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic, or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than *bona fide* military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it, he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise, by their behavior, furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshipping ceremonies," and to "dual citizenship." Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so. * * * *

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. *See* House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued, and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. * * * *

Mr. Justice Jackson, dissenting

* * * * Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its

own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.
* * * *

Check Your Understanding

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Notes

1. Be prepared to articulate the standard(s) used by the Court in *Hirabayshi* and *Korematsu*? Is it reasonableness or something more "searching" as *Carolene Products* footnote four suggests would be appropriate?

2. The cases cited in the opinions as support for the proposition that the Court has previously held legislative classification on race alone violative of equal protection include *Yick Wo v. Hopkins*, which we will discuss later, and *Hill v. Texas* (1942), holding the exclusion of "negroes" in grand jury service in Texas violated the Equal Protection Clause.

3. Both Gordon Hirabayshi and Fred Korematsu were active in civil rights after World War II, including efforts to obtain reparations and apologies and were honored by Presidential Medals of Freedom.

II. Dismantling *Plessy* in Education

State of Missouri ex rel. Gaines v. Canada

305 U.S. 337 (1938)

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. {Note: The Registrar of the law school was named Cy Woodson Canada, who is the Respondent}. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the {state} Circuit Court. The Supreme Court of the State affirmed the judgment. We granted certiorari.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri (1929), providing as follows:

May arrange for attendance at university of any adjacent state-tuition fees. Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department.

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's 'work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible'. He was refused admission upon the ground that it was 'contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri'. It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university must be regarded as state action. The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. 11, Sec. 3), and by statute separate high school facilities are supplied for colored students equal to those provided for white students. While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher

education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. * * * *

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy v. Ferguson*. Respondents' counsel have appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. * * * *

The state court stresses the advantages that are afforded by the law schools of the adjacent States, Kansas, Nebraska, Iowa and Illinois, which admit non-resident negroes. * * * * We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

* * * *Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. * * * *

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

* * * *The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

Reversed and remanded.

Separate {dissenting} opinion of Mr. Justice McReynolds {joined by Mr. Justice Butler}.

Considering the disclosures of the record, the Supreme Court of Missouri arrived at a tenable conclusion and its judgment should be affirmed. That court well understood the grave difficulties of the situation and rightly refused to upset the settled legislative policy of the State by directing a mandamus. * * * *

Sweatt v. Painter

339 U.S. 629 (1950)

Mr. Chief Justice Vinson delivered the opinion of the {unanimous} Court.

This case {and another} present different aspects of this general question: to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. * * * *

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946, term. His application was rejected solely because he is a Negro. Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed. Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, because of the manifest importance of the constitutional issues involved.

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived, nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association, and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit

petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. * * * *

{P}etitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson* (1896), requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Brown v. Board of Education of Topeka

347 U.S. 483 (1954)

Mr. Chief Justice Warren delivered the opinion of the {unanimous} 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 had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Fergson.* Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. * * * * In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. * * * *

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." * * * * Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." Whatever may have been the extent of

psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority {footnote 11; see Notes}. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, * * * * for the reargument this Term The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so. * * * *

It is so ordered.

Check Your Understanding

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Bolling v. Sharpe

347 U.S. 497 (1954)

Mr. Chief Justice Warren delivered the opinion of the {unanimous} Court.

This case challenges the validity of segregation in the public schools of the District of Columbia. * * * *

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools {footnote citation to *Brown*}. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions, and hence constitutionally suspect. {footnote citation to *Korematsu*}. * * * *

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution. * * * *

Check Your Understanding

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Further Your Understanding

CALI Lesson:Equal Protection and the Federal Government: Reverse Incorporation

CALI, The Center for Assisted Legal Instruction, has a lesson designed to assist and further your understanding of an important principle articulated in *Bolling v. Sharpe*, the applicability of the Equal Protection Clause to the federal government, a constitutional doctrine often known as "reverse incorporation."

Brown v. Board of Education of Topeka (Brown II)

349 U.S. 294 (1955)

Mr. Chief Justice Warren delivered the opinion of the {unanimous} Court.

{The Court's previous opinions in *Brown I*} 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.* * * *

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 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. * * * *

It is so ordered.

Notes

1. Be prepared to articulate the holding of *Bolling v. Sharpe* with regard to the Fifth Amendment and the Fourteenth Amendment's Equal Protection Clause. This is sometimes called "reverse incorporation."

2. Footnote 11 in *Brown I* stating that the lower court's finding was "amply supported by modern authority" provided:

K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Mid-century 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).

The first reference is to the famous "doll studies" by Kenneth and Mamie Clark, as explained here:

In the 1940s, psychologists Kenneth and Mamie Clark designed and conducted a series of experiments known colloquially as "the doll tests" to study the psychological effects of segregation on African-American children. {The methodology began as part of Mamie Clark's masters' thesis in psychology.}

In the famous "doll studies," Drs. Clark used four dolls, identical except for color, to test children's racial perceptions. Their subjects, children between the ages of three to seven, were asked to identify both the race of the dolls and which color doll they prefer. A majority of the children preferred the white doll and assigned positive characteristics to it. The Clarks concluded that "prejudice, discrimination, and segregation" created a feeling of inferiority among African-American children and damaged their self-esteem.

The doll test was only one part of Dr. Clark's testimony in *Brown* – it did not constitute the largest portion of his analysis and expert report. His conclusions during his testimony were based on a comprehensive analysis of the most cutting-edge psychology scholarship of the period.

NAACP-LDF, *Doctors Kenneth and Mamie Clark and "The Doll Test,"*http://www.naacpldf.org/brown-at-60-the-doll-test. The doll study become a "symbol and lightning rod" for *Brown*; one of the dolls is now displayed in the National Historic Site for *Brown v. Board of Education*, https://www.nps.gov/brvb/learn/historyculture/clarkdoll.htm Kenneth Clark was a Professor at CUNY (City College) for a number of years and was the first African-American President of the American Psychological Ass'n.

Cooper v. Aaron

358 U.S. 1 (1958)

Opinion of the Court by The Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan, and Mr. Justice Whittaker.

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions. * * * *

{The school district was preparing to a plan for desegregation even as Arkansas state officials} were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose 'in every Constitutional manner the Unconstitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court,' Ark. Const. Amend. 44, and, through the initiative, a pupil assignment law, Ark. Stats. §§ 80-1519 to 80-1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark. Stats. § 80-1525, and a law establishing a State Sovereignty Commission, Ark. Stats. §§ 6-801 to 6-824, were enacted by the General Assembly in February 1957. * * * *

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position, in essence, was that, because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the

school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing, the District Court granted the relief requested by the Board. * * * * {While the proceedings are complex; the Eighth Circuit reversed, but stayed its mandate. The United States Supreme Court granted the petition for certiorari.} "Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958-1959 school year, we convened in Special Term on August 28, 1958, and heard oral argument on the respondents' motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae*, and asserted that the Court of Appeals' judgment was clearly correct. {The Court unanimously affirmed the Eighth Circuit on September 12, 1958, issued a brief per curiam opinion, and this opinion followed on September 29}.

{The Court held that the School Board and Superintendent were state actions bound by the Fourteenth Amendment to comply with *Brown*}.

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 "to support this Constitution." * * * * No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. * * * *

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*. The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion, three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

{Concurring opinion of Justice Frankfurter, who also joined the main opinion, omitted}.

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Note: Limiting *Brown*

In *Brown II*, the Court famously stated that the lower courts would oversee desegregation working with "all deliberate speed." Plaintiffs represented by various civil rights law firms (including the NAACP Inc. Fund) as well as the Department of Justice

brought desegregation lawsuits against school districts in federal court; often there was a "special master" appointed by the federal court as an expert to develop a plan and there were many "consent decrees." Some school districts were undeniably hostile. For example, Prince Edward County, Virginia closed its public schools rather than comply with *Brown*: the Court found this violated the Equal Protection Clause in *Griffin v. County School Board*, 377 U.S. 218 (1964). Some school districts were cooperative; many were a mix and fluctuated.

In the litigation, decisions, and public discourse, rifts were not only between pro-*Brown* and anti-*Brown* but became more nuanced. One such divide concerned the ultimate goal: was it racial desegregation or was it racial integration? Another controversy centered on the role of the federal courts and their constitutional power to order remedies. Additionally, the relevance of time changed from accomplishing desegregation in public schools with "all deliberate speed" to tracing responsibility for present segregated conditions ("de facto" segregation) back to mandatory legal ("de jure") segregation.

A number of cases reached the United States Supreme Court, but the following **three** are pivotal.

In ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1 (1971), involving schools in the city of Charlotte, North Carolina, and surrounding Mecklenburg County in a district of 550 square miles, a unanimous Supreme Court upheld court-ordered busing of students and transfer of teachers to achieve desegregation. Writing for the Court, Chief Justice Burger stated:

Absent a constitutional violation, there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

Nevertheless:

[T]he 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.

In ***Milliken v. Bradley***, 418 U.S. 717 (1974), involving Detroit and surrounding areas in Michigan, the district judge had ordered "busing" between the school district of Detroit, which had been subject of a 1970 state law resisting racial desegregation, and 85 other "outlying" school districts in three other counties which had not been subject to any local or state laws regarding racial segregation in schools. The Court, in a majority five Justice opinion by Chief Justice Burger, reversed the remedial busing order across districts:

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus, an inter-district 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 inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy.

In other words, there must be a direct nexus of between the constitutional "wrong" and the remedy. In *Milliken*, the problematical connection is primarily one of "place." When the case returned to the Court, *Milliken II* (1977), the Court upheld the district judge's subsequent remedies that focused on reform only of the Detroit schools.

In ***Freeman v. Pitts***, 498 U.S. 1081 (1992), the Court considered developments arising from a 1969 consent decree seeking to remedy racial segregation in the DeKalb County School System, in suburban Atlanta, Georgia. The question before the Court was whether the DeKalb County system had achieved "unitary" status and could thus be released from court supervision, despite the fact that the schools were not racially integrated.

Writing for the Court majority, Justice Kennedy stated:

That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. *Swann*. * * * * If the unlawful de jure policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. * * * *

Where resegregation is a product not of state action, but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies. * * * *

As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith. In light of its finding that the demographic changes in DeKalb County are unrelated to the prior violation, the District Court was correct to entertain the suggestion that DCSS had no duty to achieve system wide racial balance in the student population.

Some of these principles and cases will resurface in Affirmative Action doctrine later in this chapter.

III. Evaluating Racial Classifications

Note: Strict Scrutiny

Racial classifications receive strict scrutiny, meaning the government interest must be compelling and the means chosen must be narrowly tailored to achieve that interest.

In contrast to strict scrutiny, rational basis scrutiny requires only that the government interest be legitimate and the means chosen to serve that interest be rationally related to it.

The United States Supreme Court does not always use this precise terminology, but it has clearly articulated it in a more than a few cases and it is evinced in many others. This is the terminology used by almost all other courts and lawyers.

Loving v. Virginia

388 U.S. 1 (1967)

Mr. Chief Justice Warren delivered the opinion of the {Unanimous} 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, 199, 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 marriage. 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 * * * * we noted probable jurisdiction* * * *.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 258 of the Virginia Code:

Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Section 259, which defines the penalty for miscegenation, provides:

Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. {footnote 4: see Notes} The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period. 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.

I

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1965 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.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill* (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska* (1923), and *Skinner v. Oklahoma* (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages.

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

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York* (1949) * * * * {other cases omitted}. In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President {Andrew} Johnson vetoed, and the Civil Rights Act of 1866, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem that, although these historical sources "cast some light" they are not sufficient to resolve the problem;

[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments, and wished them to have the most limited effect.

Brown v. Board of Education (1954). *See also Strauder v. West Virginia* (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama* (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases* (1873); *Strauder v. West Virginia* (1880); *Ex parte Virginia* (1880); *Shelley v. Kraemer* (1948); *Burton v. Wilmington Parking Authority* (1961).

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

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II

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

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma* (1942). *See also Maynard v. Hill* (1888). 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.

These convictions must be reversed.

It is so ordered.

Mr. Justice Stewart, concurring.

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

Check Your Understanding

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Notes

1. Be prepared to discuss all of the arguments of the parties as well as the Court's conclusion using the strict scrutiny standard in *Loving.*

2. Be prepared to discuss the relevance of Footnote 4 of the Court's opinion in *Loving* which reads:

Section 20-54 of the Virginia Code provides:

Intermarriage prohibited; meaning of term "white persons."—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

Va.Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocathontas. . . ." *Plecker, The New Family and Race Improvement*, 17 Va.Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925)* * * *.

Section 1-14 of the Virginia Code provides:

Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an

American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.

Va.Code Ann. § 1-14 (1960 Repl. Vol.).

3. Section II of the Court's opinion, which is brief and reproduced in full in the text, will resurface in Due Process Clause doctrine in later chapters.

IV. Neutral Classifications?

Yick Wo v. Hopkins

118 U.S. 356 (1886)

{The 1880 San Francisco Ordinance under which Yick Wo was convicted and imprisoned provided

It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

According to the allegations, there were about 320 laundries in the San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, *viz.*, 320, about 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in San Francisco. The case is consolidated with another similar case.}

Mr. Justice Matthews delivered the opinion of the {unanimous} Court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal under the constitution and laws of the State is not open to us. * * * *

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction, for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinance, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. * * * *

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier v. Connolly* (1885) and *Soon Hing v. Crowley* (1885). In both of these cases, the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county of San Francisco from ten o'clock at night until six o'clock in the morning of the following day. This provision was held to be purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies, a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions and entitled to the same privileges under similar conditions.

For these reasons, that ordinance was adjudged not to be within the prohibitions of the Fourteenth Amendment to the Constitution of the United States * * * *

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone, but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are

those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because, in such cases, the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China. {Treaty discussion omitted}. The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. * * * *

The questions we have to consider and decide in these cases, therefore, are to be treated as invoking the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

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

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

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

* * * *

In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations

between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * * *

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

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Washington v. Davis

426 U.S. 229 (1976)

White, J., delivered the opinion of the Court, in which Burger, C.J., and Blackmun, Powell, Rehnquist, and Stevens, JJ., joined, and in Parts I and II of which Stewart, J., joined. Stevens, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined.

Mr. Justice White delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

I

{The issue involved an assertion} 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 * * * *. Defendants answered, and discovery and various other proceedings followed. Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds. The District Court granted petitioners' and denied respondents' motions.

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," and which was "designed to test verbal ability, vocabulary, reading and comprehension."

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been

validated to establish its reliability for measuring subsequent job performance." This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates [sic] to discriminate against otherwise qualified blacks." It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance – "The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process." The District Court ultimately concluded that "[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence."

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by *Griggs v. Duke Power Co.* (1971), a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one. The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks – four times as many – failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison [not] material to this appeal." The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorari. * * * *

II

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. * * * *

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe* (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Almost 100 years ago, *Strauder v. West Virginia* (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas* (1945). * * * *

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. * * * *

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins* (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins v. Texas* * * * *

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact – in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires – may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida* (1964), 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 council-men were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

Wright v. Council of City of Emporia (1972) also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." There was thus no need to find "an independent constitutional violation." Citing *Palmer v. Thompson*, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither *Palmer* nor *Wright* was understood to have changed the prevailing rule is apparent from *Keyes v. School Dist. No. 1*, where the principal issue in litigation was whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. * * * *

Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion

of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

III

{procedural discussion omitted}

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

Justice Stevens, concurring:

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action

simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in * * * * *Yick Wo v. Hopkins*, it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.

Justice Brennan, with whom Justice Marshall joins, dissenting.

{Omitted; the dissent argues that the Court of Appeals should be affirmed because petitioners have failed to prove that Test 21 satisfies the applicable statutory standards under Title VII}.

Arlington Heights v. Metropolitan Housing Dev. Corp.

429 U.S. 252 (1977)

Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, Blackmun, and Rehnquist, JJ., joined. Marshall, J., filed an opinion concurring in part and dissenting in part, in which Brennan, J., joined. White, J., filed a dissenting opinion. Stevens, J., took no part in the consideration or decision of the case.

Mr. 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, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968. Following a bench trial, the District Court entered judgment for the Village and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. We granted the Village's petition for certiorari and now reverse.

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east, the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act. MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970, MHDC was in the process of building one § 236 development near Arlington Heights, and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale agreement was

contingent upon MHDC's securing zoning clearances from the Village and § 236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of $300,000, low enough to comply with federal limitations governing land-acquisition costs for § 236 housing.

MHDC engaged an architect and proceeded with the project, to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from the outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three, or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance, and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under § 236. The materials made clear that one requirement under § 236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue"—the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: "While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location."

Two members voted against the motion and submitted a minority report, stressing that, in their view, the change to accommodate Lincoln Green represented "good zoning." The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June, MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and injunctive relief. A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs.

The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit, the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low income groups when they denied rezoning, but rather by a desire "to protect property values and the integrity of the Village's zoning plan." The District Court concluded also that the denial would not have a racially discriminatory effect.

A divided Court of Appeals reversed. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. Deciding whether their refusal to rezone would have discriminatory effects was more complex. The court observed that the refusal would have a disproportionate impact on blacks. Based upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become tenants of Lincoln Green, although they composed a far lower percentage of total area population. * * * * {T}he Court of Appeals ruled that the denial of rezoning must be examined in light of its "historical context and ultimate effect." Northwest Cook County was enjoying rapid

growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been "exploiting" the situation by allowing itself to become a nearly all-white community. The Village had no other current plans for building low- and moderate-income housing, and no other R-5 parcels in the Village were available to MHDC at an economically feasible price.

Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

II

{standing discussion omitted}

III

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. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts.

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). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *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 plan to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

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

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Washington v. Davis*. The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was,

without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision.

In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants."

On appeal, the Court of Appeals focused primarily on respondents' claim that the Village's buffer policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals. "The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." The Court of Appeals therefore approved the District Court's findings concerning the Village's purposes in denying rezoning to MHDC.

We also have reviewed the evidence. 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.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture, and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.

This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

V

{Fair Housing Act discussion omitted}

Reversed and remanded.

{Omitted opinions suggested that the decision should have been remanded to the Court of Appeals to reconsider in light of *Washington v. Davis*}.

Check Your Understanding

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Notes

1. Be prepared to list the factors articulated by the Court in *Arlington Heights* for determining intent.

2. The Court further explained the intent requirement in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), a challenge to Massachusetts' veterans' preference statute regarding civil service positions. In an opinion by Justice Stewart, the Court stated that the decision to grant a preference to veterans was "intentional" and "it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men." Nevertheless,

"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 reenacted 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.

3. A famous critique of the intent test is articulated by Critical Race Theorist Professor Charles R. Lawrence III, in *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). Professor Lawrence argues that most racism (and other prejudice) is not overt but is the product of unconscious bias. He suggests that a better method "would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance." Others have suggested that this "symbolic message" test would itself be subject to unconscious bias in its articulation and application.

4. Be prepared to identify the slippery slope rationale articulated by Justice White in *Washington v. Davis*. Do you agree?

5. *Yick Wo* (1886) is the most famous of the trio sometimes called "the Chinese Laundry Cases;" the other cases are *Barbier v. Connolly*, 113 U.S. 27 (1884), and *Soon Hing v. Crowley*, 113 U.S. 703 (1885), also involving San Francisco. An important principle of these cases is that "subjects of the Emperor of China" and thus all non-citizens were included by the term "person" in the Fourteenth Amendment. Note that the so-called Chinese Exclusion Act, Sess. I, Chap. 126; 22 Stat. 58 (1882), sought to limit immigration and excluded Chinese persons from becoming citizens.

Thus, *Yick Wo* is a foundational case in two distinct Equal Protection doctrines: intent and non-citizen coverage.

Check Your Understanding

CALI Lesson: Race and Equal Protection

CALI, The Center for Assisted Legal Instruction, has a lesson designed to further your understanding of the constitutional issues, doctrine, and theories regarding the legal treatment of race under the Equal Protection Clause of the Fourteenth Amendment as well as under other constitutional provisions (with the exception of "affirmative action" which is the subject of a separate lesson). This lesson begins with an overview of slavery in constitutional law, proceeds to the early cases under the Reconstruction Amendments, concentrates on the development of the strict scrutiny standard, and considers how seemingly neutral classifications may be deemed to be racial classifications. This completion time for this lesson is approximately 80 minutes.

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1.5: CHAPTER FOUR- Race and Equal Protection – Part 2

V. Affirmative Action

A. The Standard of Scrutiny

Note: Bakke

The first university affirmative action case to come before the Court was *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). It resulted in a highly fractured decision and highlights many of the doctrinal and theoretical issues that continue to permeate affirmative action.

The University of California at Davis Medical School twice rejected Allan Bakke, a white man, for admission for two years. The Medical School's admissions goal was 100 students, with 16 seats in the "special admissions program" for applicants who wished to be considered as members of a "minority group," "which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." He sued in California state court on the basis of the Fourteenth Amendment's Equal Protection Clause, as well as the California constitution, and statutes. The California Supreme Court ruled in his favor on the Equal Protection claim.

The United States Supreme Court's decision affirmed the California Supreme Court, but there was no clear majority opinion. Justice Powell, however, rendered the "judgment of the Court" – – – yet Justice Powell was the only Justice in this majority judgment who rested his decision on the Equal Protection Clause; the other Justices who ruled in favor of Bakke and against the university rested their decision on Title VI of the Civil Rights Act. On the other hand, four Justices – – – Brennan, White, Marshall, and Blackmun – – – would have ruled that the university special admissions program did not violate the Equal Protection Clause.

Powell contended that strict scrutiny should apply:

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.

This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights, *Shelley v. Kraemer*. *Accord, Missouri ex rel. Gaines v. Canada*. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.* This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect: "Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi*.

Justice Powell then considered the interests asserted and whether the means chosen (the 16 seats) was narrowly tailored to achieve that interest. The purposes put forward by the university were these:

1. "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession."

1. reducing the historic deficit of traditionally underserved minorities in medical schools and in the medical profession;
2. countering the effects of societal discrimination;
3. increasing the number of physicians who will practice in communities currently underserved; and
4. obtaining the educational benefits that flow from an ethnically diverse student body.

Powell rejected the first interest as facially invalid because it prefers one group over another. He concluded that the university did not have a sufficient basis or competency to make a finding of societal discrimination. As to the third, he found that while "a State's interest in facilitating the health care of its citizens" might be "sufficiently compelling to support the use of a suspect classification," here there was not a close enough fit because there "is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." Finally, Powell concluded that attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." However, again the university program was not sufficiently narrowly tailored for Powell:

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity.

Powell lauded the Harvard College Admissions Program and appended a description of the policy to his opinion.

For the oft-called "Brennan four," the university's affirmative action plan should be subject only to intermediate scrutiny rather than strict scrutiny. Generally, intermediate scrutiny requires an important (rather than compelling) government interest that is served by substantially related means (rather than narrowly tailored). While the Brennan four recognized that there was a racial classification, they argued that it was a benign (rather than invidious) classification. They would have held that the University of California at Davis satisfied this intermediate scrutiny standard.

Justice Blackmun, who joined the Brennan four, also wrote separately and stated:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

Note: Fullilove and Wygant

During the 1980s, the increasingly divisive "affirmative action" debate included the legal issue of how affirmative action programs and policies should be evaluated by courts. The United States Supreme Court's opinions did little to solve the issue because the Court itself was divided.

In ***Fullilove v. Klutznick***, 448 U.S. 448 (1980), a 6 Justice majority upheld the "minority business enterprise" (MBE) provision of the federal Public Works Employment Act of 1977 which required that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The main plurality opinion, by Chief Justice Burger, joined by two other Justices (White and Powell), concluded that the "remedial" MBE program on its face did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Burger's opinion rejected arguments that the MBE program was underinclusive or overinclusive. Three other Justices, in an opinion by Justice Thurgood Marshall and joined by Brennan and Blackmun, concurred, but concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives.

In ***Wygant v. Jackson Board of Education***, 476 U.S. 267 (1986), the Court held unconstitutional an exemption to a "last-hired first-fired" collective bargaining provision between a teachers' union and Board of Education in Jackson, Michigan that sought to maintain the current level of "minority personnel" (defined as "Black, American Indian, Oriental, or Spanish descendancy"). Wygant and other nonminority teachers who faced being laid off, challenged the agreement entered into by the school board. The plurality opinion by Justice Powell, joined by Chief Justice Burger, Justice Rehnquist, and in part by Justice O'Connor), applied strict scrutiny, and held that the lay off plan did not have a strong basis in the evidence that remedial action was necessary to address the school's own discrimination and that the desire for role models for students was not compelling. Justice White concurred but wrote separately. Four other Justices dissented.

Note that *Fullilove* challenged an act by Congress (and thus invoked the Fifth Amendment) and *Wygnant* challenged an act by a subdivision of the state of Michigan (and thus invoked the Fourteenth Amendment).

The next case includes discussions of both *Fullilove* and *Wygant*.

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

O'Connor, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which Rehnquist, C. J., and White, Stevens, and Kennedy, JJ., joined, an opinion with respect to Part II, in which Rehnquist, C. J., and White, J., joined, and an opinion with respect to Parts III-A and V, in which Rehnquist, C. J., and White and Kennedy, JJ., joined. Stevens, J., and Kennedy, J., filed {separate} opinions concurring in part and concurring in the judgment. Scalia, J., filed an opinion concurring in the judgment. Marshall, J., filed a dissenting opinion, in which Brennan and Blackmun, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan, J., joined.

O'Connor, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which Rehnquist, C. J., and White, Stevens, and Kennedy, JJ., joined, an opinion with respect to Part II, in which Rehnquist, C. J., and White, J., joined, and an opinion with respect to Parts III-A and V, in which Rehnquist, C. J., and White and Kennedy, JJ., joined.

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. In *Fullilove v. Klutznick* (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. * * * * We noted probable jurisdiction in this case to consider * * * * a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, 12-156(a) (1985). The 30% set-aside 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 authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved."* * * *

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. * * * *

The Plan was adopted by the Richmond City Council after a public hearing. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction 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. The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove* * * * *

{J. A. Croson Company (Croson), a mechanical plumbing and heating contractor, had a successful bid for the provision and installation of certain plumbing fixtures at the city jail. But the City decided to rebid the project because Croson could not comply with the MBE requirement, although the company attempted to have a MBE supply fixtures and attempted to get a waiver. Croson sued in federal district court, challenging the constitutionality of the plan. The procedural history included two decisions by the Fourth Circuit Court of Appeals.}

The District Court upheld the Plan in all respects. In its original opinion, a divided panel of the Fourth Circuit Court of Appeals affirmed. Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove* and *Bakke*. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council. * * * *

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant v. Jackson Board of Education* (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." As the court read this requirement, "[f]indings of societal discrimination will not suffice; the findings must concern 'prior discrimination by the government unit involved.'"

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts . . . ." Moreover, the statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." ****

The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant*. We noted probable jurisdiction of the city's appeal, and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. 6701 et seq. (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. The

primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: "'Except to the extent the Secretary determines otherwise, no grant shall be made under this Act . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.'" MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." * * * *

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

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

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. * * * *The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster."

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. * * * *

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. * * * *

That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to * * * * insulate any racial classification from judicial scrutiny* * * *. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. * * * *

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." * * * *

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

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

Classification based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *Bakke* (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. * * * *

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*., n. 4 (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

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

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. * * * *

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area. ***

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 . . . ." *Bakke* (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. 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. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. 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. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

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.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.

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. * * * *

Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

Justice Kennedy, concurring in part and concurring in the judgment {omitted}

Justice Scalia, concurring in the judgment {omitted}

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. ***

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.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. ***

So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant v. Jackson Bd. of Education* (1986) (Marshall, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny. *University of California Regents v. Bakke* (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.) Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." * * * * {analysis omitted}

III

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

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. 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. As I stated in *Fullilove*: "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional 'strict scrutiny' – scrutiny that is strict in theory, but fatal in fact."

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.

B

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

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. * * * *

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. * * * *

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

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. * * * *

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

IV

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

Check Your Understanding

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Adarand Constructors, Inc. v. Peña

515 U.S. 200 (1995)

O'Connor, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of Scalia, J., and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by Rehnquist, C. J., and Kennedy and Thomas, JJ., and by Scalia, J., to the extent heretofore indicated; and Part III-C was joined by Kennedy, J. Scalia, J., and Thomas, J., filed opinions concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined. Souter, J., filed a dissenting opinion, in which Ginsburg and Breyer, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Breyer, J., joined.

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

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

I

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

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid had it not been for the additional payment it received by hiring Gonzales instead. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that

[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. §§ 637(d)(2), (3).

Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. * * * * {discussion omitted}

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. The Court of Appeals for the Tenth Circuit affirmed. It understood our decision in *Fullilove v. Klutznick* (1980), to have adopted "a

lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc. v. FCC* (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. We granted certiorari.

II

{The Court found that Adarand had standing to challenge the government action}

III

The Government urges that "[t]he Subcontracting Compensation Clause program is . . . a program based on disadvantage, not on race," and thus that it is subject only to "the most relaxed judicial scrutiny." To the extent that the statutes and regulations involved in this case are race-neutral, we agree. The Government concedes, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. The parties disagree as to what that level should be. * * * *

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

A

{discussion of equal protection under the Fifth Amendment omitted}

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to benefit such groups should also be subject to "the most rigid scrutiny." * * * *

The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. * * * *

The Court resolved the issue at least in part, in 1989. *Richmond v. J. A. Croson Co*. (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. * * * *

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. * * * *

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" *Wygant*, 476 U.S. at 273 (plurality opinion of Powell, J.); *Fullilove*, 448 U.S. at 491 (opinion of Burger, C.J.); *see also id*. at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin*, 379 U.S. at 192 ("[R]acial classifications [are] 'constitutionally suspect'"); *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment); *see also Bakke*, 438 U.S. at 289-290 (opinion of Powell, J.), *i. e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S. at 93; *see also Weinberger v. Wiesenfeld*, 420 U.S. at 638, n. 2; *Bolling v. Sharpe*, 347 U.S. at 500. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. * * * *

A year later {after *Croson*}, however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC* (1990), involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission. In *Metro Broadcasting*, the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling*. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said,

—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Metro Broadcasting. The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express

confiden[ce] that an "examination of the legislative scheme and its history" will separate benign measures from other types of racial classifications.

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," and that they were "substantially related" to that objective. It therefore upheld the policies. * * * *

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

C

{discussion of stare decisis omitted}

D

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove* (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. * * * * 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.

IV

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. * * * *

The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.

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

It is so ordered.

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

I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: in my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J. A. Croson Co.* (1989) (Scalia, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole, but, under our Constitution, there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State . . . deny to *any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, § 9 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

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

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

I agree with the majority's conclusion that strict scrutiny applies to all government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice Stevens' and Justice Ginsburg's dissents: that there is a racial paternalism exception to the principle of equal protection* * * * 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," {Justice Stevens' dissent}. 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, with whom Justice Ginsburg joins, dissenting.

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

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification.

* * * * In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and stare decisis with the same type of skepticism that the Court advocates for the underlying issue.

II

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

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 * * * *

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

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority. Indeed, as I have previously argued, the former is virtually always repugnant to the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant v. Jackson Board of Ed.* (1986) (Stevens, J., dissenting). By insisting on a doctrinaire notion of "consistency" in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

III

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

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by members of today's majority. Thus, in *Metro Broadcasting, Inc. v. FCC* (1990), in which we upheld a federal program designed to foster racial diversity in broadcasting, we identified the special "institutional competence" of our National Legislature. * * * *

What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the

heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776-1787 (1969). * * * *

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

IV

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

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick*, and the second in 1990, *Metro Broadcasting, Inc. v. FCC*, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question. By way of explanation, Justice O'Connor advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." A skeptical observer might ask whether this pronouncement is a faithful application of the doctrine of stare decisis.

* * * *

V

{discussion of *Fullilove* omitted}

VI

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

Check Your Understanding

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Notes

1. Consider O'Connor's three principles in *Adarand*. Are they doctrine, theoretical perspective, or something else? Are they supported by the citations?

2. Be prepared to discuss dissenting Justice Stevens' reference to "the anomalous result" regarding the application of the consistency principle.

3. Be prepared to articulate the standard of "intermediate scrutiny." While the Court in *Adarand* rejects this as the standard for "affirmative action" racial classifications, note that this is the standard that is applicable to sex/gender classifications as decided by the Court in *Craig v. Boren*, 429 U.S. 190 (1976), discussed in a later chapter.

B. Diversity and Education

Grutter v. Bollinger

539 U.S. 306 (2003)

O'Connor, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, and in which Scalia and Thomas, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas, J. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Thomas, J., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Scalia, J., joined as to Parts I—VII. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., filed a dissenting opinion.

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 *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 against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment * * * *{as well Title VI of the Civil Rights Act of 1964}.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." * * * *

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students.

Erica Munzel, who succeeded Shields as Director of Admissions, testified that " 'critical mass' " means " 'meaningful numbers' " or " 'meaningful representation,' " which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores.

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did not quantify critical mass in terms of numbers or percentages. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a " 'determinative' " factor.

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. When asked about the policy's " 'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,' " Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers.

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no " 'minority viewpoint' " but rather a variety of viewpoints among minority students.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz,

generated and analyzed “admissions grids” for the years in question (1995—2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made “ ‘cell-by-cell’ ” comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups “ ‘is an extremely strong factor in the decision for acceptance,’ ” and that applicants from these minority groups “ ‘are given an extremely large allowance for admission’ ” as compared to applicants who are members of nonfavored groups. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School’s admissions calculus.

Dr. Stephen Raudenbush, the Law School’s expert, focused on the predicted effect of eliminating race as a factor in the Law School’s admission process. In Dr. Raudenbush’s view, a race-blind admissions system would have a “ ‘very dramatic,’ ” negative effect on underrepresented minority admissions. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

In the end, the District Court concluded that the Law School’s use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School’s asserted interest in assembling a diverse student body was not compelling because “the attainment of a racially diverse class … was not recognized as such by *Bakke* and is not a remedy for past discrimination.” The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner’s request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court’s judgment and vacated the injunction. The Court of Appeals first held that Justice Powell’s opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. * * * *The Court of Appeals also held that the Law School’s use of race was narrowly tailored because race was merely a “potential ‘plus’ factor” and because the Law School’s program was “virtually identical” to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. * * * *

We granted certiorari, to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood* v. *Texas* (5th Cir. 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith* v. *University of Wash. Law School* (9th Cir. 2000) (holding that it is).

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. * * * *

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell’s diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent. * * * *

[T]oday 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.” *Adarand Constructors, Inc.* v. *Peña* (1995). We are a “free people whose institutions are founded upon the doctrine of equality.” *Loving* v. *Virginia* (1967). It follows from that principle that “government may treat people differently because of their race only for the most compelling reasons.” *Adarand*.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Adarand*. 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." *Richmond* v. *J. A. Croson Co.* (1989) (plurality opinion). 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." *Croson*.

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*. Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id*. 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.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. In *Adarand Constructors, Inc.* v. *Peña*, we made clear that strict scrutiny must take " 'relevant differences' into account." Indeed, as we explained, that is its "fundamental purpose." Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

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.

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e.g.*, *Richmond* v. *J. A. Croson Co.*, (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

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: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 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." *Bakke* (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Bakke; Freeman* v. *Pitts* (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond* v. *J. A. Croson Co*. 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." Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e.g.*, W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

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. Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3—4. 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 mission to provide national security." Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.*, at 5. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." *Id.*, at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid*.

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. *Sweatt* v. *Painter* (1950) (describing law school as a "proving ground for legal learning and practice"). 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. See Brief for Association of American Law Schools as *Amicus Curiae* 5—6. 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. All members of our heterogeneous society must have

confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt* v. *Painter*. 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." *Richmond* v. *J. A. Croson Co.* (plurality opinion).

* * * * 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." *Bakke* (opinion of Powell, J.). 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." *Richmond* v. *J. A. Croson Co.* (plurality opinion). 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." *Bakke* (opinion of Powell, J.). 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. Nor, as Justice Kennedy posits {in a dissenting opinion} does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "suggest[ ] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Moreover, as Justice Kennedy concedes, 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.

The Chief Justice {in his dissenting opinion} believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. But, as The Chief Justice concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to 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. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke* (opinion of Powell, J.) (identifying the "denial … of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz* v. *Bollinger*, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan, the Law School's admissions policy "is 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." *Bakke* (opinion of Powell, J.).

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 {in dissenting opinion} 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.

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant* v. *Jackson Bd. of Ed* (1986) (alternatives must serve the interest " 'about as well' "); *Richmond* v. *J. A. Croson Co.*(plurality

opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

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. Brief for United States as *Amicus Curiae* 14—18. The United States does not, however, explain how such plans could work for graduate and professional schools. More-over, 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 acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke* (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id*. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc.* v. *FCC* (1990) (O'Connor, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke* (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname…. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti* (1984). 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 Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. * * * *

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. 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. * * * * The judgment of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

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.

* * * * Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.

* * * * Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.' " They contend that a "critical mass" of underrepresented minorities is necessary to further that interest. Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. * * * *

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.* * * *

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. * * * *

[T]he correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

* * * *For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to

the Law School would be significantly smaller if the race of each applicant were not considered. But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. * * * *

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional.".

Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. * * * *

{other dissenting opinions omitted}

Note: Gratz v. Bollinger

In ***Gratz v. Bollinger***, 539 U.S. 244 (2003), a companion case to *Grutter*, the Court decided that the undergraduate admissions policy of University of Michigan violated the Equal Protection Clause. The admissions policy allocated points to candidates on a number of factors: high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and racial/ethnic minority status. Applicants from an "under-represented racial or ethnic minority" were awarded 20 points toward the 100 needed for admission. In a 5-4 opinion issued the same day as *Grutter*, the majority opinion by Chief Justice Rehnquist (joined by O'Connor, Scalia, Kennedy, and Thomas) found 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."

Notable among the dissenting opinions is the one by Justice Ginsburg (joined by Justice Souter), which pointed out a possible consequence of the Court's opinion for universities that wish to promote diversity:

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. See, *e.g.*, Steinberg, Using Synonyms for Race, College Strives for Diversity, N. Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14—15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). 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.

Check Your Understanding

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Parents Involved in Community Schools v. Seattle School District No. 1

551 U.S. 701 (2007)

Roberts, C.J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined, and an opinion with respect to Parts III–B and IV, in which Scalia, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Kennedy, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

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. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. Three of the oversubscribed schools were "integration positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. Franklin was "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the

2000–2001 school year than otherwise would have been. Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act * * * * {and after proceedings on this issue, a} panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests. The Ninth Circuit granted rehearing en banc, and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest. We granted certiorari.

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.

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young.

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." We granted certiorari.

II

{standing discussion omitted}

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. *Grutter* v. *Bollinger*; *Adarand*. As the Court recently reaffirmed, " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " *Gratz* v. *Bollinger*. 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. *Adarand*.

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. See *Freeman* v. *Pitts* (1992). 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." *Milliken* v. *Bradley* (1977). See also *Freeman v. Pitts*. 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*. 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." As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."

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*, 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,' " *Grutter.* * * * *

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." See also *Bakke* (opinion of Powell, J.). 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." *Grutter*. 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. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." 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 plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," based on the objective of achieving at "all schools … an African-American enrollment equivalent to the average district-wide African-American enrollment" of 34 percent. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be—drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics."

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. When asked for "a range of percentage that would be diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality." The district did not attempt to defend the proposition that anything outside its range posed the "specter of exceptionality." Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial

isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

Similarly, Jefferson County's expert referred to the importance of having "at least 20 percent" minority group representation for the group "to be visible enough to make a difference," and noted that "small isolated minority groups in a school are not likely to have a strong effect on the overall school." The Jefferson County plan, however, is based on a goal of replicating at each school "an African-American enrollment equivalent to the average district-wide African-American enrollment." Joshua McDonald's requested transfer was denied because his race was listed as "other" rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. At the time, however, Young Elementary was 46.8 percent black. The transfer might have had an adverse effect on the effort to approach district-wide racial proportionality at Young, but it had nothing to do with preventing either the black or "other" group from becoming "small" or "isolated" at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian. When the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity.

* * * *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." *Croson*, *(*plurality opinion of O'Connor, J.). An interest "linked to nothing other than proportional representation of various races … would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."

* * * *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. ("Q. What's your understanding of when a school suffers from racial isolation? A. I don't have a definition for that"); ("I don't think we've ever sat down and said, 'Define racially concentrated school exactly on point in quantitative terms.' I don't think we've ever had that conversation"); ("Q. How does the Jefferson County School Board define diversity …?" "A. Well, we want to have the schools that make up the percentage of students of the population").

Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required. * * * *

However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

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; the district was able to track the

enrollment status of 293 of these students. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. In over one-third of the assignments affected by the racial tiebreaker, then, 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. In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.' " 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. * * * *

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. * * * *

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, Justice Breyer's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes.

This Court has recently reiterated, however, that " '*all* racial classifications [imposed by government] … must be analyzed by a reviewing court under strict scrutiny.' " (quoting *Adarand*). See also *Grutter* ("[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). Justice Breyer nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that … repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." We have found many. * * * *

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e.g.*, *Gratz* (Breyer, J., concurring in judgment) and (Ginsburg, J., dissenting); *Adarand* (Stevens, J., dissenting); *Wygant*, (Stevens, J., dissenting), and has been repeatedly rejected. See also *Bakke* (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

* * * 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." *Adarand* (emphasis added). 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.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word," Justice Breyer still purports to apply strict scrutiny to these cases. It is evident, however, that Justice Breyer's brand of narrow tailoring is quite unlike anything found in our precedents. * * * *

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."

Justice Breyer's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." But the examples the dissent mentions—for example, a provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups—have nothing to do with the pertinent issues in these cases.

Justice Breyer also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. These other means—*e.g.*, where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

* * *

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." *Adarand* (internal quotation marks omitted). 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," *Croson*, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw* v. *Reno* (1993), 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." *Metro Broadcasting* (O'Connor, J., dissenting). As the Court explained in *Rice* v. *Cayetano* (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown* v. *Board of Education* (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.*, at 494 ("'The impact [of segregation] is greater when it has the sanction of the law' "). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*." *Brown II* (emphasis added).

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." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I* (Summary of Argument). 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." Tr. of Oral Arg. in *Brown I*, p. 7 (Robert L. Carter, Dec. 9, 1952). 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* (emphasis added). 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," *Brown II*, 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.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

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 agree with The Chief Justice that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by The Chief Justice, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause.

I

{omitted}

{Justice Kennedy does state that "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue, but finds the school districts' use of racial categories are not justified and are not narrowly tailored.}

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

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. Cf. *Grutter* v. *Bollinger* (2003); *id* (Kennedy, J., dissenting). 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 decisionmaker 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.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III–C of the Court's opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

III

{discussion of Justice Breyer's dissent omitted}

* * *

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.

That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.

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.

With this explanation I concur in the judgment of the Court.

Stevens, J., filed a dissenting opinion.

While I join Justice Breyer's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in The Chief Justice's reliance on our decision in *Brown* v. *Board of Education*. 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 Justice 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. * * * *

Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

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* 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. * * * *

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Fisher v. University of Texas at Austin (Fisher I)

570 U.S. ___ (2013)

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, Breyer, Alito, and Sotomayor, JJ., joined. Scalia, J., and Thomas, J., filed concurring opinions. Ginsburg, J., filed a dissenting opinion. Kagan, J., took no part in the consideration or decision of the case.

Justice Kennedy delivered the opinion of the Court.

I

A

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. *Hopwood v. Texas*.

The second program was adopted to comply with the *Hopwood* decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with

the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after *Hopwood*, the University also expanded its outreach programs.

The Texas State Legislature also responded to the *Hopwood* decision. It enacted a measure known as the Top Ten Percent Law * * * * [which] grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-Hopwood AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-Hopwood and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.

Following this Court's decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the University adopted a third admissions program, the 2004 program in which the University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions (Proposal). The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. Petitioner sought a writ of certiorari. The writ was granted.

B

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving

the educational benefits of a more diverse student body: *Bakke; Gratz; and Grutter*. We take those cases as given for purposes of deciding this case.

We begin with the principal opinion authored by Justice Powell in *Bakke*. In *Bakke*, the Court considered a system used by the medical school of the University of California at Davis. From an entering class of 100 students the school had set aside 16 seats for minority applicants. In holding this program impermissible under the Equal Protection Clause Justice Powell's opinion stated certain basic premises. First, "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." The principle of equal protection admits no "artificial line of a 'two-class theory' " that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification.

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced class-room dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is "a special concern of the First Amendment." Part of " 'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' " and this in turn leads to the question of " 'who may be admitted to study.' "

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

In *Gratz* and *Grutter* the Court endorsed the precepts stated by Justice Powell. In *Grutter*, the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions."

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. "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." *Gratz*. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter*, but instead must "remain flexible enough to 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." 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." *Bakke* (opinion of Powell, J.).

While these are the cases that most specifically address the central issue in this case, additional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," and therefore "are contrary to our traditions and hence constitutionally suspect." " '[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,' " *Richmond v. J. A. Croson Co.*, "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.' " *Loving v. Virginia*.

To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." Strict scrutiny is a searching examination, and it is the government that bears the burden to prove " 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,' " *Croson*.

II

Grutter made clear that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.

According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, " 'based on its experience and expertise,' " that a diverse student body would serve its educational goals. There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*. "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter.* "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.

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. *Bakke*. 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." See *Grutter* (emphasis added). 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.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption. The Court of Appeals held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y].". Because "the efforts of the University have been studied, serious, and of high purpose," the Court of Appeals held that the use of race in the admissions program fell within "a constitutionally protected zone of discretion."

These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." As noted above, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

Grutter did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

* * * *The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment. In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not "simple . . . assurances of good intention"—is sufficient is a question for the Court of Appeals in the first instance.

Strict scrutiny must not be " 'strict in theory, but fatal in fact,' " *Adarand*. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke* (opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. I write separately to explain that I would overrule *Grutter v. Bollinger*, and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

I

A

The Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws." The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins* (1995) (Thomas, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.*

Under strict scrutiny, all racial classifications are categorically prohibited unless they are " 'necessary to further a compelling governmental interest' " and "narrowly tailored to that end." This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins* (Thomas, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Peña* (Thomas, J., concurring in part and concurring in judgment). "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." *Grutter* (Thomas, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu v. United States* (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." Aside from *Grutter*, the Court has recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu*, the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage." Second, the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.' " *Richmond v. J. A. Croson Co.*

In contrast to these compelling interests that may, in a narrow set of circumstances, justify racial discrimination, the Court has frequently found other asserted interests insufficient. * * * *

2

Grutter was a radical departure from our strict-scrutiny precedents. * * * *

II

A

The University claims that the District Court found that it has a compelling interest in attaining "a diverse student body and the educational benefits flowing from such diversity." The use of the conjunction, "and," implies that the University believes its discrimination furthers two distinct interests. The first is an interest in attaining diversity for its own sake. The second is an interest in attaining educational benefits that allegedly flow from diversity.

Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible "racial balancing." Rather, diversity can only be the means by which the University obtains educational benefits; it cannot be an end pursued for its own sake. Therefore, the educational benefits allegedly produced by diversity must rise to the level of a compelling state interest in order for the program to survive strict scrutiny.

Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education* (1954), the alleged educational benefits of diversity cannot justify racial discrimination today. * * * *

B

My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o 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." The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

This principle is neither new nor difficult to understand. In 1868, decades before *Plessy*, the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark v. Board of Directors*, 24 Iowa 266 (1868), a school denied admission to a student because she was black, and "public sentiment [was] opposed to the intermingling of white and colored children in the same schools." The Iowa Supreme Court rejected that flimsy justification, holding that "all the youths are equal before the law, and there is no discretion vested in the board . . . or elsewhere, to interfere with or disturb that equality." "For the courts to sustain a board of school directors . . . in limiting the rights and privileges of persons by reason of their [race], would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.

I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.

III

While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities. The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

A

Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. * * * *

A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. And they even appealed to the fact that many blacks agreed that separate schools were in the "best interests" of both races.

Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. * * * * It is for this reason that the Court has repeatedly held that strict scrutiny applies to all racial classifications, regardless of whether the government has benevolent motives. The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3–4, and n. 4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. * * * *

Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145–146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained "clustered in certain programs." But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools. These students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors.

Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." *Adarand* (opinion of Thomas, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. "When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." See *Grutter* (opinion of Thomas, J.). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

For the foregoing reasons, I would overrule *Grutter*. However, because the Court correctly concludes that the Court of Appeals did not apply strict scrutiny, I join its opinion.

Justice Ginsburg, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*. The University has steered clear of a quota system like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats. And, like so many educational institutions across the Nation, the University has taken care to follow the model approved by the Court in *Grutter v. Bollinger*.

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. * * * *

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4–5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans. As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz* (Ginsburg, J., dissenting).

I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Gratz (*dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives. Justice Powell's opinion in *Bakke* and the Court's decision in *Grutter* require no further determinations.

The Court rightly declines to cast off the equal protection framework settled in *Grutter*. Yet it stops short of reaching the conclusion that framework warrants. Instead, the Court vacates the Court of Appeals' judgment and remands for the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." As I see it, the Court of Appeals has already completed that inquiry, and its judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation.

Note: *Fisher* on remand in the Fifth Circuit

In *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), the Fifth Circuit on remand affirmed its earlier ruling that the University of Texas plan was constitutional in a 2-1 decision. [Recall that panels on the Courts of Appeals are comprised of three

judges].

Many found the result surprising.

The Fifth Circuit majority opinion concluded:

In sum, it is suggested that while holistic review may be a necessary and ameliorating complement to the Top Ten Percent Plan, UT Austin has not shown that its holistic review need include any reference to race, this because the Plan produces sufficient numbers of minorities for critical mass. This contention views minorities as a group, abjuring the focus upon individuals—each person's unique potential. Race is relevant to minority and non-minority, notably when candidates have flourished as a minority in their school—whether they are white or black. *Grutter* reaffirmed that "[j]ust 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 still matters." We are persuaded that to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of *Bakke* and *Grutter*. The need for such skill sets to complement the draws from majority-white and majority-minority schools flows directly from an understanding of what the Court has made plain diversity is not. To conclude otherwise is to narrow its focus to a tally of skin colors produced in defiance of Justice Kennedy's opinion for the Court which eschewed the narrow metric of numbers and turned the focus upon individuals. This powerful charge does not deny the relevance of race. We find force in the argument that race here is a necessary part, albeit one of many parts, of the decisional matrix where being white in a minority-majority school can set one apart just as being a minority in a majority-white school—not a proffer of societal discrimination in justification for use of race, but a search for students with a range of skills, experiences, and performances—one that will be impaired by turning a blind eye to the differing opportunities offered by the schools from

It is settled that instruments of state may pursue facially neutral policies calculated to promote equality of opportunity among students to whom the public schools of Texas assign quite different starting places in the annual race for seats in its flagship university. It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity. This interest is compelled by the reality that university education is more the shaping of lives than the filling of heads with facts—the classic assertion of the humanities. Yet the backdrop of our efforts here includes the reality that accepting as permissible policies whose purpose is to achieve a desired racial effect taxes the line between quotas and holistic use of race towards a critical mass. We have hewed this line here, persuaded by UT Austin from this record of its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race, faithful to the content given to it by the Supreme Court. To reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing.

For these reasons, we AFFIRM.

The Fifth Circuit declined en banc review by a vote of 10-5. http://lawprofessors.typepad.com/conlaw/2014/11/fifth-circuit-denies-en-banc-review-in-fisher-remand-.html. Not surprisingly, the United States Supreme Court granted certiorari to review the Fifth Circuit's 2014 decision.

Fisher v. University of Texas at Austin (Fisher II)

579 U.S. ___ (2016)

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J., joined. Kagan, J., took no part in the consideration or decision of the case.

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. {remainder of facts omitted}.

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," *Richmond* v. *J. A. Croson Co.*, "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I*. Strict scrutiny requires the university to demonstrate with clarity that its "'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'"

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' … is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. A university, *Fisher I* explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," *Grutter*, it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." *Fisher I*.

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by *Fisher I*. Judge Garza dissented.

III

The University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*.

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it. * * * *

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." *Fisher I*, see also *Grutter*. As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society."

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the "'promot[ion of] cross-racial understanding,'" the preparation of a student body "'for an increasingly diverse workforce and society,'" and the "'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'" Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. *Fisher I*. The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. See, *e.g.*, *post*, at 45– 46 (opinion of Alito, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African-American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African-American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian-American students tell a similar story. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a "'minimal impact' in advancing the [University's] compelling interest." Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 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. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I* (Ginsburg, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." *Ibid.* Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it. See *Grutter* (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); *Fisher* (5th Cir.) (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [*Regents of Univ. of Cal.* v. *Bakke*] envisions"). At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz* (Ginsburg, J., dissenting).

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I.* The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored. * * * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt* v. *Painter* (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies. The judgment of the Court of Appeals is affirmed.

Justice Kagan took no part in the consideration or decision of this case.

Justice Thomas filed a separate dissenting opinion {omitted}.

Justice Alito, with whom The Chief Justice and Justice Thomas join, dissenting.

Something strange has happened since our prior decision in this case. (*Fisher I*). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request. * * * *

I

Over the past 20 years, UT has frequently modified its admissions policies, and it has generally employed race and ethnicity in the most aggressive manner permitted under controlling precedent. {remainder of discussion of facts omitted}.

II

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. * * * *

A

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Richmond* v. *J. A. Croson Co.* (Kennedy, J., concurring in part and concurring in judgment). * * * *

B

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. * * * * But to this day, UT has not explained in anything other than the vaguest terms what it means by "critical mass." * * * *

C

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

1

First, both UT and the majority cite demographic data as evidence that African-American and Hispanic students are "underrepresented" at UT and that racial preferences are necessary to compensate for this underrepresentation. But neither UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass.

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African-Americans and Hispanics in Texas, where African-Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African-American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)? * * * *

To the extent that UT is pursuing parity with Texas demographics, that is nothing more than "outright racial balancing," which this Court has time and again held "patently unconstitutional." * * * *

The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms. UT's 2004 Proposal illustrates this approach by repeatedly citing numerical assessments of the racial makeup of the student body and various classes as the justification for adopting a race-conscious plan. Instead of focusing on the benefits of diversity, UT seems to have resorted to a simple racial census. * * * *

2

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity. The Proposal stressed that UT "has not reached a critical mass at the *classroom level*."

UT now equivocates, disclaiming any discrete interest in classroom diversity. Instead, UT has taken the position that the lack of classroom diversity was merely a "red flag that UT had not yet fully realized" "the constitutionally permissible educational benefits of diversity."

* * * *[I]f UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best "nuanced quantitative data" supporting UT's position, demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic. But the UT plan discriminates *against* Asian-American students. UT is apparently unconcerned that Asian-Americans "may be made to feel isolated or may be seen as . . . 'spokesperson[s]' of their race or ethnicity." And unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian-Americans), it seemingly views the classroom contributions of Asian-American students as less valuable than those of Hispanic students. In UT's view, apparently, "Asian

Americans are not worth as much as Hispanics in promoting 'cross-racial understanding,' breaking down 'racial stereotypes,' and enabling students to 'better understand persons of different races.'" Brief for Asian American Legal Foundation *et al*. as *Amici Curiae* 11 (representing 117 Asian-American organizations). The majority opinion effectively endorses this view, crediting UT's reliance on the classroom study as proof that the University assessed its need for racial discrimination (including racial discrimination that undeniably harms Asian-Americans) "with care."

* * * * In addition to demonstrating that UT discriminates against Asian-American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories. Under the UT plan, both the favored and the disfavored groups are broad and consist of students from enormously diverse backgrounds ("five predefined racial categories"). Because "[c]rude measures of this sort threaten to reduce [students] to racial chits," *Parents Involved* (opinion of Kennedy, J.), UT's reliance on such measures further undermines any claim based on classroom diversity statistics, see *id.*, at 723 (majority opinion) (criticizing school policies that viewed race in rough "white/nonwhite" or "black/'other'" terms); *id.*, at 786 (opinion of Kennedy, J.) (faulting government for relying on "crude racial categories"); *Metro Broadcasting*, (Kennedy, J., dissenting) (concluding that "'the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals,'" and noting that if the government "'is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935'").

For example, students labeled "Asian American," seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population," Brief for Asian American Legal Foundation et al. as *Amici Curiae*. It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against Asian-American students because they are "overrepresented" in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, "Filipino Americans" or "Cambodian Americans." As long as there are a sufficient number of "Asian Americans," UT is apparently satisfied.

UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African-American," "Hispanic," "Asian American," "Native American," or "White." And UT evidently labels each student as falling into only a single racial or ethnic group, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010. A recent survey reported that 26% of Hispanics and 28% of Asian-Americans marry a spouse of a different race or ethnicity.

UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student's classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say. It instead relies on applicants to "classify themselves." *Fisher I*. This is an invitation for applicants to game the system.

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

3

UT's purported interest in intraracial diversity, or "diversity within diversity," also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African-American and Hispanic students admitted through the Top Ten Percent Plan. * * * *

IV

It is important to understand what is and what is not at take in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," App. 396a, and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes

1. Justice Alito's dissenting opinion in *Fisher II* is substantially edited in the above text; it more than 50 pages. Justice Kennedy's opinion for the majority is 20 pages. Thoughts?

2. *Fisher II* was decided by seven Justices. Justice Scalia died in February 2016, after the oral argument in December 2015, but before the Court's opinion in June 2016.

Justice Elana Kagan did not participate in *Fisher I* or *Fisher II*. Justices make the decision whether or not to recuse themselves from a case (although presumably in consultation with their Justice colleagues) and need not provide a reason. Recusal is rooted in an actual or potential conflict of interest. In *Fisher*, the widely presumed reason is that Kagan served as Solicitor General for the United States when the Department of Justice (DOJ) made the decision to file an *amicus* brief in Fisher when it was pending in the Fifth Circuit Court of Appeals. As Solicitor General, Kagan would have made the ultimate decision to file the *amicus* brief and had ultimate responsibility for the content of the brief.

3. What do you think the United States argued in its 2010 *amicus* brief to the Fifth Circuit? Here is the introduction to the Brief's Argument section (its "umbrella" section):

In the view of the United States, the University's limited use of race in its admissions program falls within the constitutional bounds delineated by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The University has a compelling interest in attaining the level of student diversity necessary to fulfill its educational mission. Before instituting its policy, the University undertook a careful study of diversity in its undergraduate enrollment, including the relative absence of minority students in the small classes that permit the highest level of student interaction and therefore benefit most from students with a range of experiences and viewpoints. See *id.* at 330. Finding that it lacked adequate student diversity, the University instituted a narrowly tailored policy that considers race as one among many contextual elements that can indicate that the applicant will bring to the University experiences and attributes that increase the diversity of the student body. Notably, in keeping with the University's broad conception of diversity, an individual of any race can benefit from having his or her race considered. And critically, the policy benefits the entire University community, and each individual within it, by helping to bring students of all races together into an educational environment where they can learn from and share experiences with one another.

Given the prominent position of the University in the State of Texas, its admissions policy is a crucial means of ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. As the Supreme Court emphasized in *Grutter*, "[e]ffective participation 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." *Ibid.* The challenged admissions policy is an important means of promoting that goal. That is particularly so because the University's admissions policy considers race in an extremely limited way. In 2008, the year plaintiffs applied for admission, fully 80% of entering freshmen were selected through the Top Ten Percent

program—an entirely race-neutral process. Race comes into play only when selecting the non-Top Ten Percent admittees, and then only as "a factor of a factor of a factor of a factor." R.E. 49.

The University's effort to promote diversity is a paramount government objective. See *Grutter*, 539 U.S. at 330-331. In view of the importance of diversity in educational institutions, the United States, through the Departments of Education and Justice, supports the efforts of school systems and post-secondary educational institutions that wish to develop admissions policies that endeavor to achieve the educational benefits of diversity in accordance with *Grutter*.

Brief for the United States as *Amicus Curiae* Supporting Appellees in Fisher v. University of Texas, *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 570 U.S. __, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013).

C. "Affirmative Action" and the Political Process

Schuette v. Coalition to Defend Affirmation Action By Any Means Necessary (BAMN)

572 U.S. ___ (2014)

Kennedy, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Alito, J., joined. Roberts, C. J., filed a concurring opinion. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. Breyer, J., filed an opinion concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined. Kagan, J., took no part in the consideration or decision of the case.

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice and Justice Alito join.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003 the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in *Gratz* v. *Bollinger*. The law school admission plan was addressed in *Grutter* v. *Bollinger*. Each admissions process permitted the explicit consideration of an applicant's race. In *Gratz*, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. In *Grutter*, the Court found no constitutional flaw in the law school admission plan's more limited use of race-based preferences.

In response to the Court's decision in *Gratz*, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

"(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

"(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

"(3) For the purposes of this section 'state' includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1."

Section 26 was challenged in two cases. Among the plaintiffs in the suits were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); students; faculty; and prospective

applicants to Michigan public universities.

[In 2008, the District Court granted summary judgment to Michigan, thus upholding § 26 (Proposal 2). A panel of the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment, thus invalidating § 26. In a closely divided decision, the Sixth Circuit en banc agreed that § 26 was unconstitutional. The United States Supreme Court granted certiorari.]

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin* (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

This Court has noted that some States have decided to prohibit race-conscious admissions policies. In *Grutter*, the Court noted: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." In this way, *Grutter* acknowledged the significance of a dialogue regarding this contested and complex policy question among and within States. There was recognition that our federal structure "permits 'innovation and experimentation' " and "enables greater citizen 'involvement in democratic processes.' " While this case arises in Michigan, the decision by the State's voters reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education.

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Mich. Const., Art. VIII, § 5. Although the members of the boards are elected, some evidence in the record suggests they delegated authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan's public universities did consider race as a factor in admissions decisions before 2006.

In holding § 26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Washington v. Seattle School Dist. No. 1* (1982) {Note: This is NOT *Parents Involved v. Seattle Schools* decided in 2007}. * * * * But that determination extends *Seattle*'s holding in a case presenting quite different issues to reach a conclusion that is mistaken here. Before explaining this further, it is necessary to consider the relevant cases that preceded *Seattle* and the background against which *Seattle* itself arose.

Though it has not been prominent in the arguments of the parties, this Court's decision in *Reitman v. Mulkey* (1967) is a proper beginning point for discussing the controlling decisions. In *Mulkey*, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. Two different cases gave rise to *Mulkey*. In one a couple could not rent an apartment, and in the other a couple were evicted from their apartment. Those adverse actions were on account of race. In both cases the complaining parties were barred, on account of race, from invoking the protection of California's statutes; and, as a result, they were unable to lease residential property. This Court concluded that the state constitutional provision was a denial of equal protection. * * * * In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding. The dissent reasoned that California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination. That dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury.

The next precedent of relevance, *Hunter v. Erickson* (1969) is central to the arguments the respondents make in the instant case. In *Hunter* the Court for the first time elaborated what the Court of Appeals here styled the "political process" doctrine. There, the Akron City Council found that the citizens of Akron consisted of "'people of different race[s], . . . many of whom live in circumscribed and segregated areas, under sub-standard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'" To address the problem, Akron enacted a fair housing ordinance to prohibit that sort of discrimination. In response, voters amended the city charter to overturn the ordinance and to require that any additional antidiscrimination housing ordinance be approved by referendum. But most other ordinances "regulating the real

property market" were not subject to those threshold requirements. The plaintiff, a black woman in Akron, Ohio, alleged that her real estate agent could not show her certain residences because the owners had specified they would not sell to black persons.

Central to the Court's reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in "'unhealthful, unsafe, unsanitary and overcrowded conditions.'" The Court stated: "It is against this background that the referendum required by [the charter amendment] must be assessed." Akron attempted to characterize the charter amendment "simply as a public decision to move slowly in the delicate area of race relations" and as a means "to allow the people of Akron to participate" in the decision. The Court rejected Akron's flawed "justifications for its discrimination," justifications that by their own terms had the effect of acknowledging the targeted nature of the charter amendment. * * * * The Court found that the city charter amendment, by singling out antidiscrimination ordinances, "places special burden on racial minorities within the governmental process," thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority. Justice Harlan filed a concurrence. He argued the city charter amendment "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." * * * * Thus, in *Mulkey* and *Hunter,* there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

Seattle is the third case of principal relevance here. There, the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools. Voters who opposed the school board's busing plan passed a state initiative that barred busing to desegregate. The Court first determined that, although "white as well as Negro children benefit from" diversity, the school board's plan "inures primarily to the benefit of the minority." The Court next found that "the practical effect" of the state initiative was to "remov[e] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests" because advocates of busing "now must seek relief from the state legislature, or from the statewide electorate." The Court therefore found that the initiative had "explicitly us[ed] the racial nature of a decision to determine the decisionmaking process." (emphasis deleted).

Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter.* Although there had been no judicial finding of de jure segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that "permitted white students to transfer out of black schools while restricting the transfer of black students into white schools." *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (Breyer, J., dissenting). In 1977, the National Association for the Advancement of Colored People (NAACP) filed a complaint with the Office for Civil Rights, a federal agency. The NAACP alleged that the school board had maintained a system of de jure segregation. Specifically, the complaint alleged "that the Seattle School Board had created or perpetuated unlawful racial segregation through, e.g., certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts." As part of a settlement with the Office for Civil Rights, the school board implemented the "Seattle Plan," which used busing and mandatory reassignments between elementary schools to reduce racial imbalance and which was the subject of the state initiative at issue in Seattle.

As this Court held in *Parents Involved*, the school board's purported remedial action would not be permissible today absent a showing of de jure segregation. That holding prompted Justice Breyer to observe in dissent, as noted above, that one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools. In all events we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior de jure segregation." In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis. *Seattle* involved a state initiative that "was carefully tailored to interfere only with desegregative busing." The *Seattle* Court, accepting the validity of the school board's busing remedy as a predicate to its analysis of the constitutional question, found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit.

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case. The Court there seized upon the statement in Justice Harlan's concurrence in *Hunter* that the procedural change in that case had "the clear purpose of

making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." That language, taken in the context of the facts in *Hunter*, is best read simply to describe the necessity for finding an equal protection violation where specific injuries from hostile discrimination were at issue. The *Seattle* Court, however, used the language from the *Hunter* concurrence to establish a new and far-reaching rationale. *Seattle* stated that where a government policy "inures primarily to the benefit of the minority" and "minorities . . . consider" the policy to be "'in their interest,'" then any state action that "place[s] effective decisionmaking authority over" that policy "at a different level of government" must be reviewed under strict scrutiny. In essence, according to the broad reading of *Seattle*, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.

* * * * The {Sixth Circuit's} expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling. The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno* (1993); see also *Metro Broadcasting, Inc. v. FCC* (1990) (Kennedy, J., dissenting) (rejecting the "demeaning notion that members of . . . defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"). It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework, the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race. This risk is inherent in adopting the *Seattle* formulation.

There would be no apparent limiting standards defining what public policies should be included in what *Seattle* called policies that "inur[e] primarily to the benefit of the minority" and that "minorities . . . consider" to be " 'in their interest.' " Those who seek to represent the interests of particular racial groups could attempt to advance those aims by demanding an equal protection ruling that any number of matters be foreclosed from voter review or participation. In a nation in which governmental policies are wide ranging, those who seek to limit voter participation might be tempted, were this Court to adopt the *Seattle* formulation, to urge that a group they choose to define by race or racial stereotypes are advantaged or disadvantaged by any number of laws or decisions. Tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects. Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.

Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted. The constitutional validity of some of those choices regarding racial preferences is not at issue here. The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow. In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race are avoided, not invited. And if these factors are to be interjected, surely it ought not to be at the invitation or insistence of the courts.

One response to these concerns may be that objections to the larger consequences of the *Seattle* formulation need not be confronted in this case, for here race was an undoubted subject of the ballot issue. But a number of problems raised by *Seattle*, such as racial definitions, still apply. And this principal flaw in the ruling of the Court of Appeals does remain: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools. Here there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.

* * * * By approving Proposal 2 and thereby adding § 26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, *Brown v. Board of Education* (1954); a wrongful invasion of the home, *Silverman v. United States* (1961); or punishing a protester whose views offend others, *Texas v. Johnson* (1989); and scores of other examples teach that individual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. * * * *

For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Chief Justice Roberts, concurring.

The dissent devotes 11 pages to expounding its own policy preferences in favor of taking race into account in college admissions, while nonetheless concluding that it "do[es] not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court." (opinion of Sotomayor, J.). The dissent concedes that the governing boards of the State's various universities could have implemented a policy making it illegal to "discriminate against, or grant preferential treatment to," any individual on the basis of race. On the dissent's view, if the governing boards conclude that drawing racial distinctions in university admissions is undesirable or counterproductive, they are permissibly exercising their policymaking authority. But others who might reach the same conclusion are failing to take race seriously.

The dissent states that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race." And it urges that "[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" But it is not "out of touch with reality" to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. To disagree with the dissent's views on the costs and benefits of racial preferences is not to "wish away, rather than confront" racial inequality. People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.

Justice Scalia, with whom Justice Thomas joins, concurring in the judgment.

It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires? Needless to say (except that this case obliges us to say it), the question answers itself. "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Grutter v. Bollinger* (2003) (Scalia, J., concurring in part and dissenting in part). It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously offend it.

Even taking this Court's sorry line of race-based-admissions cases as a given, I find the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits? Reacting to those race-based-admissions decisions, some States—whether deterred by the prospect of costly litigation; aware that *Grutter's* bell may soon toll; or simply opposed in principle to the notion of "benign" racial discrimination—have gotten

out of the racial-preferences business altogether. And with our express encouragement: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaging in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." Respondents seem to think this admonition was merely in jest. The experiment, they maintain, is not only over; it never rightly began. Neither the people of the States nor their legislatures ever had the option of directing subordinate public-university officials to cease considering the race of applicants, since that would deny members of those minority groups the option of enacting a policy designed to further their interest, thus denying them the equal protection of the laws. Never mind that it is hotly disputed whether the practice of race-based admissions is ever in a racial minority's interest. And never mind that, were a public university to stake its defense of a race-based-admissions policy on the ground that it was designed to benefit primarily minorities (as opposed to all students, regardless of color, by enhancing diversity), we would hold the policy unconstitutional.

* * * * I part ways with *Hunter*, *Seattle*, and (I think) the plurality for an additional reason: Each endorses a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. Few equal-protection theories have been so squarely and soundly rejected. "An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent," and that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." * * * *

Notwithstanding our dozens of cases confirming the exception-less nature of the *Washington v. Davis* rule, the plurality opinion leaves ajar an effects-test escape hatch modeled after *Hunter* and *Seattle*, suggesting that state action denies equal protection when it "ha[s] the serious risk, if not purpose, of causing specific injuries on account of race," or is either "designed to be used, or . . . *likely to be used*, to encourage infliction of injury by reason of race." (emphasis added). Since these formulations enable a determination of an equal-protection violation where there is no discriminatory intent, they are inconsistent with the long *Washington v. Davis* line of cases.

Respondents argue that we need not bother with the discriminatory-purpose test, since § 26 may be struck more straightforwardly as a racial "classification." Admitting (as they must) that § 26 does not on its face "distribut[e] burdens or benefits on the basis of individual racial classifications," *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007), respondents rely on *Seattle*'s statement that "when the political process or the decisionmaking mechanism used to address racially conscious legislation —and only such legislation—is singled out for peculiar and disadvantageous treatment," then that "singling out" is a racial classification. But this is just the political-process theory bedecked in different doctrinal dress. A law that "neither says nor implies that persons are to be treated differently on account of their race" is not a racial classification. That is particularly true of statutes mandating equal treatment. "[A] law that prohibits the State from classifying individuals by race . . . a fortiori does not classify individuals by race." {*Coalition for Economic Equity v. Wilson*, 9th Circuit (O'Scannlain, J.)}.

Thus, the question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose. *Seattle* stresses that "singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation." True enough, but that motivation must be proved. And respondents do not have a prayer of proving it here. The District Court noted that, under "conventional equal protection" doctrine, the suit was "doom[ed]." Though the Court of Appeals did not opine on this question, I would not leave it for them on remand. In my view, any law expressly requiring state actors to afford all persons equal protection of the laws (such as Initiative 350 in Seattle, though not the charter amendment in *Hunter*) does not—cannot—deny "to any person . . . equal protection of the laws," U. S. Const., Amdt. 14, § 1, regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.

As Justice Harlan observed over a century ago, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson* (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.

Justice Breyer, concurring in the judgment.

* * * * I continue to believe that the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided *Grutter* endure. * * * *

This case, in contrast {to *Hunter* and *Seattle}* does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards, see Mich. Const., Art. VIII, § 5, but those boards delegated admissions-related decisionmaking authority to unelected university faculty members and administrators. Although the boards unquestionably retained the *power* to set policy regarding race-conscious admissions, in *fact* faculty members and administrators set the race-conscious admissions policies in question. (It is often true that elected bodies—including, for example, school boards, city councils, and state legislatures—have the power to enact policies, but in fact delegate that power to administrators.) Although at limited times the university boards were advised of the content of their race-conscious admissions policies, to my knowledge no board voted to accept or reject any of those policies. Thus, un-elected faculty members and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan's constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Why does this matter? For one thing, considered conceptually, the doctrine set forth in *Hunter* and *Seattle* does not easily fit this case. In those cases minorities had participated in the political process and they had won. The majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future. The majority thereby diminished the minority's ability to participate meaningfully in the electoral process. But one cannot as easily characterize the movement of the decisionmaking mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority's ability to participate meaningfully in the *political* process. There is no prior electoral process in which the minority participated.

For another thing, to extend the holding of *Hunter* and *Seattle* to reach situations in which decisionmaking authority is moved from an administrative body to a political one would pose significant difficulties.

* * * *

Finally, the principle that underlies *Hunter* and *Seattle* runs up against a competing principle, discussed above. This competing principle favors decisionmaking though the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.

As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an un-elected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process.

This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities. Prior to the enactment of the constitutional initiative at issue here, all of the admissions policies of Michigan's public colleges and universities—including race-sensitive admissions policies—were in the hands of each institution's governing board. The members of those boards are nominated by political parties and elected by the citizenry in statewide elections. After over a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity. And this Court twice blessed such efforts—first in *Regents of Univ. of Cal. v. Bakke* (1978), and again in *Grutter v. Bollinger* (2003), a case that itself concerned a Michigan admissions policy.

In the wake of *Grutter*, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies. Those voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies. When this Court holds that the Constitution permits a particular policy, nothing prevents a majority of a State's voters from choosing not to adopt that policy. Our system of government encourages—and indeed, depends on—that type of democratic action.

But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities. They did so in the 2006 election by amending the Michigan Constitution to enact Art. I, § 26, which provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

As a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else. This Court has held that the Fourteenth Amendment does not tolerate "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington v. Seattle School Dist. No. 1* (1982). Such restructuring, the Court explained, "is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others." *Hunter v. Erickson* (1969). In those cases—*Hunter* and *Seattle*—the Court recognized what is now known as the "political-process doctrine": When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.

Today, disregarding stare decisis, a majority of the Court effectively discards those precedents. The plurality does so, it tells us, because the freedom actually secured by the Constitution is the freedom of self-government—because the majority of Michigan citizens "exercised their privilege to enact laws as a basic exercise of their democratic power." It would be "demeaning to the democratic process," the plurality concludes, to disturb that decision in any way. This logic embraces majority rule without an important constitutional limit.

The plurality's decision fundamentally misunderstands the nature of the injustice worked by § 26. This case is not, as the plurality imagines, about "who may resolve" the debate over the use of race in higher education admissions. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about how the debate over the use of race-sensitive admissions policies may be resolved—that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups victory in the political

process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.

Like the plurality, I have faith that our citizenry will continue to learn from this Nation's regrettable history; that it will strive to move beyond those injustices towards a future of equality. And I, too, believe in the importance of public discourse on matters of public policy. But I part ways with the plurality when it suggests that judicial intervention in this case "impede[s]" rather than "advance[s]" the democratic process and the ultimate hope of equality. I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent.

I

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its course.

The Fifteenth Amendment, ratified after the Civil War, promised to racial minorities the right to vote. But many States ignored this promise. In addition to outright tactics of fraud, intimidation, and violence, there are countless examples of States categorically denying to racial minorities access to the political process. * * * *

This Court did not stand idly by. In Alabama, for example, the legislature responded to increased black voter registration in the city of Tuskegee by amending the State Constitution to authorize legislative abolition of the county in which Tuskegee was located, Ala. Const. Amdt. 132 (1957), repealed by Ala. Const. Amdt. 406 (1982), and by redrawing the city's boundaries to remove all the black voters "while not removing a single white voter," *Gomillion v. Lightfoot* (1960). The Court intervened, finding it "inconceivable that guaranties embedded in the Constitution" could be "manipulated out of existence" by being "cloaked in the garb of [political] realignment."

This Court's landmark ruling in *Brown v. Board of Education* (1954) triggered a new era of political restructuring, this time in the context of education. * * * *

The Court remained true to its command in *Brown*. In Arkansas, for example, it enforced a desegregation order against the Little Rock school board. *Cooper v. Aaron* (1958). On the very day the Court announced that ruling, the Arkansas Legislature responded by changing the rules. It enacted a law permitting the Governor to close any public school in the State, and stripping local school districts of their decisionmaking authority so long as the Governor determined that local officials could not maintain "'a general, suitable, and efficient educational system.'" The then-Governor immediately closed all of Little Rock's high schools.

The States' political restructuring efforts in the 1960's and 1970's went beyond the context of education. Many States tried to suppress the political voice of racial minorities more generally by reconfiguring the manner in which they filled vacancies in local offices, often transferring authority from the electorate (where minority citizens had a voice at the local level) to the States' executive branch (where minorities wielded little if any influence). * * * *

II

It was in this historical context that the Court intervened in *Hunter v. Erickson*, (1969), and *Washington v. Seattle School Dist. No. 1* (1982). Together, *Hunter* and *Seattle* recognized a fundamental strand of this Court's equal protection jurisprudence: the political-process doctrine. To understand that doctrine fully, it is necessary to set forth in detail precisely what the Court had before it, and precisely what it said. For to understand *Hunter* and *Seattle* is to understand why those cases straightforwardly resolve this one.

* * * *

A

{extensive discussion of *Hunter* and *Seattle* omitted}

B

Hunter and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority's right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority," *Seattle*; and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents' favor.

1

Section 26 has a "racial focus." That is clear from its text, which prohibits Michigan's public colleges and universities from "grant[ing] preferential treatment to any individual or group on the basis of race." Mich. Const., Art. I, § 26. Like desegregation of public schools, race-sensitive admissions policies "inur[e] primarily to the benefit of the minority," as they are designed to increase minorities' access to institutions of higher education.

Petitioner argues that race-sensitive admissions policies cannot "inur[e] primarily to the benefit of the minority," as the Court has upheld such policies only insofar as they further "the educational benefits that flow from a diverse student body," *Grutter*. But there is no conflict between this Court's pronouncement in *Grutter* and the common-sense reality that race-sensitive admissions policies benefit minorities. Rather, race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two.

It is worth emphasizing, moreover, that § 26 is relevant only to admissions policies that have survived strict scrutiny under *Grutter*; other policies, under this Court's rulings, would be forbidden with or without § 26. A *Grutter*-compliant admissions policy must use race flexibly, not maintain a quota; must be limited in time; and must be employed only after "serious, good faith consideration of workable race-neutral alternatives." The policies banned by § 26 meet all these requirements and thus already constitute the least restrictive ways to advance Michigan's compelling interest in diversity in higher education.

2

{Extensive citations and quotations from amicus briefs and secondary sources in this section omitted}.

Section 26 restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.

Long before the enactment of § 26, the Michigan Constitution granted plenary authority over all matters relating to Michigan's public universities, including admissions criteria, to each university's eight-member governing board.

* * * * The boards are indisputably a part of the political process in Michigan.

* * * *

Before the enactment of § 26, Michigan's political structure permitted both supporters and opponents of race-sensitive admissions policies to vote for their candidates of choice and to lobby the elected and politically accountable boards. Section 26 reconfigured that structure. After § 26, the boards retain plenary authority over all admissions criteria except for race-sensitive admissions policies. To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution. That is no small task. To place a proposed constitutional amendment on the ballot requires either the support of two-thirds of both Houses of the Michigan Legislature or a vast number of signatures from Michigan voters—10 percent of the total number of votes cast in the preceding gubernatorial election. See Mich. Const., Art. XII, §§ 1, 2. Since more than 3.2 million votes were cast in the 2010 election for Governor, more than 320,000 signatures are currently needed to win a ballot spot. Moreover, "[t]o account for invalid and duplicative signatures, initiative sponsors 'need to obtain substantially more than the actual required number of signatures, typically by a 25% to 50% margin.' "

And the costs of qualifying an amendment are significant. For example, "[t]he vast majority of petition efforts . . . require initiative sponsors to hire paid petition circulators, at significant expense." In addition to the cost of collecting signatures, campaigning for a majority of votes is an expensive endeavor, and "organizations advocating on behalf of marginalized groups remain . . .

outmoneyed by corporate, business, and professional organizations." In 2008, for instance, over $800 million was spent nationally on state-level initiative and referendum campaigns, nearly $300 million more than was spent in the 2006 cycle. Donovan 98. "In several states, more money [is] spent on ballot initiative campaigns than for all other races for political office combined." Indeed, the amount spent on state-level initiative and referendum campaigns in 2008 eclipsed the $740.6 million spent by President Obama in his 2008 presidential campaign.

Michigan's Constitution has only rarely been amended through the initiative process. Between 1914 and 2000, voters have placed only 60 statewide initiatives on the Michigan ballot, of which only 20 have passed. Minority groups face an especially uphill battle. In fact, "[i]t is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups."

This is the onerous task that § 26 forces a Michigan citizen to complete in order to change the admissions policies of Michigan's public colleges and universities with respect to racial sensitivity. While substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of § 26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.

Such reordering of the political process contravenes *Hunter* and *Seattle*. Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. Michigan does not assert that § 26 satisfies a compelling state interest. That should settle the matter.

C

1

The plurality sees it differently. Disregarding the language used in *Hunter*, the plurality asks us to contort that case into one that "rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities." And the plurality recasts *Seattle* "as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." According to the plurality, the *Hunter* and *Seattle* Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose to discriminate. This is not a tenable reading of those cases.

The plurality identifies "invidious discrimination" as the "necessary result" of the restructuring in *Hunter*. It is impossible to assess whether the housing amendment in *Hunter* was motivated by discriminatory purpose, for the opinion does not discuss the question of intent. What is obvious, however, is that the possibility of invidious discrimination played no role in the Court's reasoning. We ordinarily understand our precedents to mean what they actually say, not what we later think they could or should have said. The *Hunter* Court was clear about why it invalidated the Akron charter amendment: It was impermissible as a restructuring of the political process, not as an action motivated by discriminatory intent.

Similarly, the plurality disregards what *Seattle* actually says and instead opines that "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." Here, the plurality derives its conclusion not from *Seattle* itself, but from evidence unearthed more than a quarter-century later in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007). * * * * It follows, according to the plurality, that Seattle's desegregation plan was constitutionally required, so that the initiative halting the plan was an instance of invidious discrimination aimed at inflicting a racial injury.

* * * * And what now of the political-process doctrine? After the plurality's revision of *Hunter* and *Seattle*, it is unclear what is left. The plurality certainly does not tell us. On this point, and this point only, I agree with Justice Scalia that the plurality has rewritten those precedents beyond recognition.

2

Justice Breyer concludes that *Hunter* and *Seattle* do not apply. * * * *

The salient point is this: Although the elected and politically accountable boards may well entrust university officials with certain day-to-day admissions responsibilities, they often weigh in on admissions policies themselves and, at all times, they retain

complete supervisory authority over university officials and over all admissions decisions. * * * *

III

The political-process doctrine not only resolves this case as a matter of stare decisis; it is correct as a matter of first principles.

A

Under our Constitution, majority rule is not without limit. Our system of government is predicated on an equilibrium between the notion that a majority of citizens may determine governmental policy through legislation enacted by their elected representatives, and the overriding principle that there are nonetheless some things the Constitution forbids even a majority of citizens to do. The political-process doctrine, grounded in the Fourteenth Amendment, is a central check on majority rule.

The Fourteenth Amendment instructs that all who act for the government may not "deny to any person . . . the equal protection of the laws." We often think of equal protection as a guarantee that the government will apply the law in an equal fashion—that it will not intentionally discriminate against minority groups. But equal protection of the laws means more than that; it also secures the right of all citizens to participate meaningfully and equally in the process through which laws are created.

Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. See *Yick Wo v. Hopkins* (1886) (political rights are "fundamental" because they are "preservative of all rights"). That right is the bedrock of our democracy, recognized from its very inception. See J. Ely, Democracy and Distrust 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes," and on the other, "with ensuring broad participation in the processes and distributions of government").

This should come as no surprise. The political process is the channel of change. It is the means by which citizens may both obtain desirable legislation and repeal undesirable legislation. Of course, we do not expect minority members of our society to obtain every single result they seek through the political process—not, at least, when their views conflict with those of the majority. The minority plainly does not have a right to prevail over majority groups in any given political contest. But the minority does have a right to play by the same rules as the majority. It is this right that *Hunter* and *Seattle* so boldly vindicated.

This right was hardly novel at the time of *Hunter* and *Seattle*. For example, this Court focused on the vital importance of safeguarding minority groups' access to the political process in *United States v. Carolene Products Co*. (1938), a case that predated *Hunter* by 30 years. In a now-famous footnote, the Court explained that while ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups. Citing cases involving restrictions on the right to vote, restraints on the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly, the Court recognized that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" could be worthy of "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Carolene Products*, n. 4, see also Ely (explaining that "[p]aragraph two {of *Carolene Products* footnote 4} suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open"). The Court also noted 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 which may call for a correspondingly more searching judicial inquiry." *Carolene Products*, n. 4, see also Ely (explaining that "[p]aragraph three {of *Carolene Products* footnote 4} suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national and racial minorities and those infected by prejudice against them").

The values identified in *Carolene Products* lie at the heart of the political-process doctrine. Indeed, *Seattle* explicitly relied on *Carolene Products*. These values are central tenets of our equal protection jurisprudence.

Our cases recognize at least three features of the right to meaningful participation in the political process. Two of them, thankfully, are uncontroversial. First, every eligible citizen has a right to vote. See *Shaw v. Reno* (1993). This, woefully, has not always been the case. But it is a right no one would take issue with today. Second, the majority may not make it more difficult for the minority to exercise the right to vote. This, too, is widely accepted. After all, the Court has invalidated grandfather clauses, good character requirements, poll taxes, and gerrymandering provisions. The third feature, the one the plurality dismantles today, is that a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws

designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws. This is the political-process doctrine of *Hunter* and *Seattle*.

My colleagues would stop at the second. The plurality embraces the freedom of "self-government" without limits. And Justice Scalia values a "near-limitless" notion of state sovereignty. The wrong sought to be corrected by the political-process doctrine, they say, is not one that should concern us and is in any event beyond the reach of the Fourteenth Amendment. As they see it, the Court's role in protecting the political process ends once we have removed certain barriers to the minority's participation in that process. Then, they say, we must sit back and let the majority rule without the key constitutional limit recognized in *Hunter* and *Seattle*.

That view drains the Fourteenth Amendment of one of its core teachings. Contrary to today's decision, protecting the right to meaningful participation in the political process must mean more than simply removing barriers to participation. It must mean vigilantly policing the political process to ensure that the majority does not use other methods to prevent minority groups from partaking in that process on equal footing. Why? For the same reason we guard the right of every citizen to vote. If "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot," were "'second-generation barriers'" to minority voting, *Shelby County v. Holder* (2013) (Ginsburg, J., dissenting) efforts to reconfigure the political process in ways that uniquely disadvantage minority groups who have already long been disadvantaged are third-generation barriers. For as the Court recognized in *Seattle*, "minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'"

To accept the first two features of the right to meaningful participation in the political process, while renouncing the third, paves the way for the majority to do what it has done time and again throughout our Nation's history: afford the minority the opportunity to participate, yet manipulate the ground rules so as to ensure the minority's defeat. This is entirely at odds with our idea of equality under the law.

To reiterate, none of this is to say that the political-process doctrine prohibits the exercise of democratic self-government. Nothing prevents a majority of citizens from pursuing or obtaining its preferred outcome in a political contest. Here, for instance, I agree with the plurality that Michiganders who were unhappy with *Grutter* were free to pursue an end to race-sensitive admissions policies in their State. They were free to elect governing boards that opposed race-sensitive admissions policies or, through public discourse and dialogue, to lobby the existing boards toward that end. They were also free to remove from the boards the authority to make any decisions with respect to admissions policies, as opposed to only decisions concerning race-sensitive admissions policies. But what the majority could not do, consistent with the Constitution, is change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals. In doing so, the majority effectively rigs the contest to guarantee a particular outcome. That is the very wrong the political-process doctrine seeks to remedy. The doctrine "hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course." {quote from 6th Circuit opinion}.

B

The political-process doctrine also follows from the rest of our equal protection jurisprudence—in particular, our reapportionment and vote dilution cases. * * * *

IV

My colleagues claim that the political-process doctrine is unadministrable and contrary to our more recent equal protection precedents. It is only by not acknowledging certain strands of our jurisprudence that they can reach such a conclusion.

A

Start with the claim that *Hunter* and *Seattle* are no longer viable because of the cases that have come after them. I note that in the view of many, it is those precedents that have departed from the mandate of the Equal Protection Clause in the first place, by applying strict scrutiny to actions designed to benefit rather than burden the minority. See *Gratz* (Ginsburg, J., dissenting) ("[A]s 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 aftereffects have been extirpated" (citation omitted)); *id.*, at 282 (Breyer, J., concurring in judgment) ("I agree. . . that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish

between policies of inclusion and exclusion, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally" (citation omitted)); *Adarand Constructors, Inc. v. Peña* (1995) (Stevens, J., dissenting) ("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"). * * * *

But even assuming that strict scrutiny should apply to policies designed to benefit racial minorities, that view is not inconsistent with *Hunter* and *Seattle*. For nothing the Court has said in the last 32 years undermines the principles announced in those cases.

{extended discussion of Scalia's opinion omitted}

B

* * * * My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out. We have seen this reasoning before. See *Parents Involved* ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"). It is a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as "not sufficient" to resolve cases of this nature. *Id.* (Kennedy, J., concurring in part and concurring in judgment). While "[t]he enduring hope is that race should not matter[,] the reality is that too often it does." *Id.*

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. And although we have made great strides, "voting discrimination still exists; no one doubts that." *Shelby County*.

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. See *Gratz* (Ginsburg, J., dissenting) (cataloging the many ways in which "the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools," in areas like employment, poverty, access to health care, housing, consumer transactions, and education); *Adarand* (Ginsburg, J., dissenting) (recognizing that the "lingering effects" of discrimination, "reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods").

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.

V

Although the only constitutional rights at stake in this case are process-based rights, the substantive policy at issue is undeniably of some relevance to my colleagues. See plurality opinion (suggesting that race-sensitive admissions policies have the "potential to become . . . the source of the very resentments and hostilities based on race that this Nation seeks to put behind it"). I will therefore speak in response.

A

For over a century, racial minorities in Michigan fought to bring diversity to their State's public colleges and universities. Before the advent of race-sensitive admissions policies, those institutions, like others around the country, were essentially segregated. In 1868, two black students were admitted to the University of Michigan, the first of their race. In 1935, over six decades later, there were still only 35 black students at the University. By 1954, this number had risen to slightly below 200. And by 1966, to around

400, among a total student population of roughly 32,500—barely over 1 percent. The numbers at the University of Michigan Law School are even more telling. During the 1960's, the Law School produced 9 black graduates among a total of 3,041—less than three-tenths of 1 percent.

The housing and extracurricular policies at these institutions also perpetuated open segregation. For instance, incoming students were permitted to opt out of rooming with black students. And some fraternities and sororities excluded black students from membership.

In 1966, the Defense Department conducted an investigation into the University's compliance with Title VI of the Civil Rights Act, and made 25 recommendations for increasing opportunities for minority students. In 1970, a student group launched a number of protests, including a strike, demanding that the University increase its minority enrollment. The University's Board of Regents responded, adopting a goal of 10 percent black admissions by the fall of 1973.

During the 1970's, the University continued to improve its admissions policies, encouraged by this Court's 1978 decision in *Bakke*. In that case, the Court told our Nation's colleges and universities that they could consider race in admissions as part of a broader goal to create a diverse student body, in which students of different backgrounds would learn together, and thereby learn to live together. A little more than a decade ago, in *Grutter*, the Court reaffirmed this understanding. In upholding the admissions policy of the Law School, the Court laid to rest any doubt whether student body diversity is a compelling interest that may justify the use of race.

Race-sensitive admissions policies are now a thing of the past in Michigan after § 26, even though—as experts agree and as research shows—those policies were making a difference in achieving educational diversity. In *Grutter*, Michigan's Law School spoke candidly about the strides the institution had taken successfully because of race-sensitive admissions. One expert retained by the Law School opined that a race-blind admissions system would have a "very dramatic, negative effect on underrepresented minority admissions." He testified that the school had admitted 35 percent of underrepresented minority students who had applied in 2000, as opposed to only 10 percent who would have been admitted had race not been considered. Underrepresented minority students would thus have constituted 4 percent, as opposed to the actual 14.5 percent, of the class that entered in 2000.

Michigan's public colleges and universities tell us the same today. The Board of Regents of the University of Michigan and the Board of Trustees of Michigan State University inform us that those institutions cannot achieve the benefits of a diverse student body without race-sensitive admissions plans. During proceedings before the lower courts, several university officials testified that § 26 would depress minority enrollment at Michigan's public universities. The Director of Undergraduate Admissions at the University of Michigan "expressed doubts over the ability to maintain minority enrollment through the use of a proxy, like socioeconomic status." Similarly, the Law School's Dean of Admissions testified that she expected "a decline in minority admissions because, in her view, it is impossible 'to get a critical mass of underrepresented minorities . . . without considering race.' " And the Dean of Wayne State University Law School stated that "although some creative approaches might mitigate the effects of [§ 26], he 'did not think that any one of these proposals or any combination of these proposals was reasonably likely to result in the admission of a class that had the same or similar or higher numbers of African Americans, Latinos and Native Americans as the prior policy.'" * * * * {statistical discussion omitted}

B

These statistics may not influence the views of some of my colleagues, as they question the wisdom of adopting race-sensitive admissions policies and would prefer if our Nation's colleges and universities were to discard those policies altogether. That view is at odds with our recognition in *Grutter*, and more recently in *Fisher v. University of Texas at Austin* (2013), that race-sensitive admissions policies are necessary to achieve a diverse student body when race-neutral alternatives have failed. More fundamentally, it ignores the importance of diversity in institutions of higher education and reveals how little my colleagues understand about the reality of race in America.

This Court has recognized that diversity in education is paramount. With good reason. Diversity ensures that the next generation moves beyond the stereotypes, the assumptions, and the superficial perceptions that students coming from less-heterogeneous communities may harbor, consciously or not, about people who do not look like them. Recognizing the need for diversity acknowledges that, "[j]ust 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." *Grutter*. And it acknowledges that "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."

Colleges and universities must be free to prioritize the goal of diversity. They must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible. The statistics I have described make that fact glaringly obvious. We should not turn a blind eye to something we cannot help but see.

To be clear, I do not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court today regarding the constitutionality of § 26. But I cannot ignore the unfortunate outcome of today's decision: Short of amending the State Constitution, a Herculean task, racial minorities in Michigan are deprived of even an opportunity to convince Michigan's public colleges and universities to consider race in their admissions plans when other attempts to achieve racial diversity have proved unworkable, and those institutions are unnecessarily hobbled in their pursuit of a diverse student body.

The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason.

In doing so, it permits the decision of a majority of the voters in Michigan to strip Michigan's elected university boards of their authority to make decisions with respect to constitutionally permissible race-sensitive admissions policies, while preserving the boards' plenary authority to make all other educational decisions. "In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Seattle. The Court abdicates that role, permitting the majority to use its numerical advantage to change the rules mid-contest and forever stack the deck against racial minorities in Michigan. The result is that Michigan's public colleges and universities are less equipped to do their part in ensuring that students of all races are "better prepare[d] . . . for an increasingly diverse workforce and society . . ." *Grutter*.

Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

I respectfully dissent.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Cooper v. Harris

581 U.S. ___ (2017)

Kagan, J., delivered the opinion of the Court, in which Thomas, Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed a concurring opinion. Alito, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Roberts, C. J., and Kennedy, J., joined. Gorsuch, J., took no part in the consideration or decision of the case.

Justice Kagan delivered the opinion of the Court.

The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm.

I

A

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune-Hill v. Virginia State Bd. of Elections* (2017). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, 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." *Miller v. Johnson* (1995). That entails demonstrating that the legislature "subordinated" other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to "racial considerations." The plaintiff may make the required showing through "direct evidence" of legislative intent, "circumstantial evidence of a district's shape and demographics," or a mix of both.

Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune-Hill*. The burden thus shifts to the State to prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end. This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act).

Two provisions of the VRA—§ 2 and § 5—are involved in this case. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race." We have construed that ban to extend to "vote dilution"—brought about, most relevantly here, by the "dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters." *Thornburg v. Gingles* (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder* (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall "retrogression" in the ability of racial minorities to elect their preferred candidates.

When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama* (2015). 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. That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune-Hill*. * * * *

B

This case concerns North Carolina's most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State's northern border. (Maps showing the districts are included in an appendix to this opinion.) Both have quite the history before this Court.

We first encountered the two districts, in their 1992 versions, in *Shaw v. Reno* (1993). There, we held that voters stated an equal protection claim by alleging that Districts 1 and 12 were unwarranted racial gerrymanders. After a remand to the District Court, the case arrived back at our door. See *Shaw v. Hunt* (1996) (*Shaw II*). That time, we dismissed the challenge to District 1 for lack of standing, but struck down District 12. The design of that "serpentine" district, we held, was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA.

The next year, the State responded with a new districting plan, including a new District 12—and residents of that district brought another lawsuit alleging an impermissible racial gerrymander. A District Court sustained the claim twice, but both times this Court reversed. See *Hunt v. Cromartie* (1999) (*Cromartie I*); *Easley v. Cromartie* (2001) (*Cromartie II*). Racial considerations, we held, did not predominate in designing the revised District 12. Rather, that district was the result of a political gerrymander—an effort to engineer, mostly "without regard to race," a safe Democratic seat.

The State redrew its congressional districts again in 2001, to account for population changes revealed in the prior year's census. Under the 2001 map, which went unchallenged in court, neither District 1 nor District 12 had a black voting-age population (called a "BVAP") that was a majority of the whole: The former had a BVAP of around 48%, the latter a BVAP of around 43%. Nonetheless, in five successive general elections conducted in those reconfigured districts, all the candidates preferred by most

African-American voters won their contests—and by some handy margins. In District 1, black voters' candidates of choice garnered as much as 70% of the total vote, and never less than 59%. And in District 12, those candidates won with 72% of the vote at the high end and 64% at the low.

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in redrawing district lines. Several hearings, drafts, and revisions later, both chambers of the State's General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. *Evenwel v. Abbott* (2016) (explaining that "[s]tates must draw congressional districts with populations as close to perfect equality as possible"). Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. With that addition, District 1's BVAP rose from 48.6% to 52.7%. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African-Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%.

Registered voters in the two districts (David Harris and Christine Bowser, here called "the plaintiffs") brought this suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. And in then applying strict scrutiny, all rejected the State's argument that it had a "strong basis" for thinking that the VRA compelled such a race-based drawing of District 1's lines. As for District 12, a majority of the panel held that "race predominated" over all other factors, including partisanship. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. Judge Osteen dissented from the conclusion that race, rather than politics, drove District 12's lines—yet still characterized the majority's view as "[e]minently reasonable."

The State filed a notice of appeal, and we noted probable jurisdiction.

II

We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case. * * * * {The Court rejected the state's contentions.}

III

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district's redesign. And it held that the State's interest in complying with the VRA could not justify that consideration of race. We uphold both conclusions.

A

Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 "must include a sufficient number of African-Americans" to make it "a majority black district." Similarly, Lewis informed the House and Senate redistricting committees that the district must have "a majority black voting age population." And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. Hofeller testified multiple times at trial that Rucho and Lewis instructed him "to draw [District 1] with a [BVAP] in excess of 50 percent."

Hofeller followed those directions to the letter, such that the 50%-plus racial target "had a direct and significant impact" on District 1's configuration. In particular, Hofeller moved the district's borders to encompass the heavily black parts of Durham (and only those parts), thus taking in tens of thousands of additional African-American voters. That change and similar ones, made (in his

words) to ensure that the district's racial composition would "add[ ] up correctly," deviated from the districting practices he otherwise would have followed. Hofeller candidly admitted that point: For example, he testified, he sometimes could not respect county or precinct lines as he wished because "the more important thing" was to create a majority-minority district. The result is a district with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts.

Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but.

B

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. And we have held that race-based districting is narrowly tailored to that objective if a State had "good reasons" for thinking that the Act demanded such steps. North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had "good reasons to believe it needed to draw [District 1] as a majority-minority district to avoid Section 2 liability" for vote dilution.

This Court identified, in *Thornburg v. Gingles*, three threshold conditions for proving vote dilution under § 2 of the VRA. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. Second, the minority group must be "politically cohesive." And third, a district's white majority must "vote [ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." If a State has good reason to think that all the "Gingles preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third Gingles prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan's adoption, African-Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. Yet throughout those two decades, as the District Court noted, District 1 was "an extraordinarily safe district for African-American preferred candidates." In the closest election during that period, African-Americans' candidate of choice received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. Those victories (indeed, landslides) occurred because the district's white population did not "vote[ ] sufficiently as a bloc" to thwart black voters' preference; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a "cross-over" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland* (2009) (plurality opinion). When voters act in that way, "[i]t is difficult to see how the majority-bloc-voting requirement could be met"—and hence how § 2 liability could be established. So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that, in this context, past performance is no guarantee of future results. Recall here that the State had to redraw its whole congressional map following the 2010 census. And in particular, the State had to add nearly 100,000 new people to District 1 to meet the one-person-one-vote standard. That meant about 13% of the voters in the new district would never have voted there before. So, North Carolina contends, the question facing the state mapmakers was not whether the then-existing District 1 violated § 2. Rather, the question was whether the future District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by "focusing myopically on past elections."

But that reasoning, taken alone, cannot justify North Carolina's race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles* (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new,

enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer—the question whether § 2 requires deliberate measures to augment the district's BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.

And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. Strickland involved a geographic area in which African-Americans could not form a majority of a reasonably compact district. The African-American community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not require crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be satisfied by crossover districts (for groups in fact meeting *Gingles*' size condition). In effect, they concluded, whenever a legislature can draw a majority-minority district, it must do so—even if a crossover district would also allow the minority group to elect its favored candidates.

That idea, though, is at war with our § 2 jurisprudence—*Strickland* included. Under the State's view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under-50% BVAP. But this Court has made clear that unless each of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." And *Strickland*, far from supporting North Carolina's view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that "[i]n areas with substantial crossover voting," § 2 plaintiffs would not "be able to establish the third Gingles precondition" and so "majority-minority districts would not be required." Thus, North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a "strong basis in evidence," but instead on a pure error of law.

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means "insist that a state legislature, when redistricting, determine precisely what percent minority population [§ 2 of the VRA] demands." But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose raison d'être is a legal mistake. Accordingly, we uphold the District Court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

IV

We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5's requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. The mapmakers drew their lines, in other words, to "pack" District 12 with Democrats, not African-Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.

Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II*, for example, this Court emphasized the "highly irregular" shape of then-District 12 in concluding that race predominated in its design. But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District

12—can arise from a "political motivation" as well as a racial one. *Cromartie I*. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." *Cromartie II*. As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I.*

Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. * * * *

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent.

A

Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African-Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) Those voter exchanges produced a sizable jump in the district's BVAP, from 43.8% to 50.7%. The Assembly thus turned District 12 (as it did District 1) into a majority-minority district.

As the plaintiffs pointed out at trial, Rucho and Lewis had publicly stated that racial considerations lay behind District 12's augmented BVAP. In a release issued along with their draft districting plan, the two legislators ascribed that change to the need to achieve preclearance of the plan under § 5 of the VRA.

* * * * Hofeller confirmed that intent in both deposition testimony and an expert report. * * * *

The State's preclearance submission to the Justice Department indicated a similar determination to concentrate black voters in District 12. "One of the concerns of the Redistricting Chairs," North Carolina there noted, had to do with the Justice Department's years-old objection to "a failure by the State to create a second majority minority district" (that is, in addition to District 1). The submission then went on to explain that after considering alternatives, the redistricters had designed a version of District 12 that would raise its BVAP to 50.7%. Thus, concluded the State, the new District 12 "increases [ ] the African-American community's ability to elect their candidate of choice." In the District Court's view, that passage once again indicated that making District 12 majority-minority was no "mere coincidence," but a deliberate attempt to avoid perceived obstacles to preclearance.

And still there was more: Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district's future make-up. According to Watt, Rucho said that "his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law." And further, that it would then be Rucho's "job to go and convince the African-American community" that such a racial target "made sense" under the Act. The District Court credited Watt's testimony about the conversation, citing his courtroom demeanor and "consistent recollection" under "probing cross-examination." In the court's view, Watt's account was of a piece with all the other evidence—including the redistricters' on-the-nose attainment of a 50% BVAP—indicating that the General Assembly, in the name of VRA compliance, deliberately redrew District 12 as a majority-minority district.

The State's contrary story—that politics alone drove decisionmaking—came into the trial mostly through Hofeller's testimony. Hofeller explained that Rucho and Lewis instructed him, first and foremost, to make the map as a whole "more favorable to Republican candidates." One agreed-on stratagem in that effort was to pack the historically Democratic District 12 with even more Democratic voters, thus leaving surrounding districts more reliably Republican. To that end, Hofeller recounted, he drew District 12's new boundaries based on political data—specifically, the voting behavior of precincts in the 2008 Presidential election between Barack Obama and John McCain. Indeed, he claimed, he displayed only this data, and no racial data, on his computer

screen while mapping the district. In part of his testimony, Hofeller further stated that the Obama-McCain election data explained (among other things) his incorporation of the black, but not the white, parts of Guilford County then located in District 13. Only after he drew a politics-based line between those adjacent areas, Hofeller testified, did he "check [ ]" the racial data and "f[ind] out" that the resulting configuration of District 12 "did not have a [§ 5] issue."

The District Court, however, disbelieved Hofeller's asserted indifference to the new district's racial composition. The court recalled Hofeller's contrary deposition testimony—his statement (repeated in only slightly different words in his expert report) that Rucho and Lewis "decided" to shift African-American voters into District 12 "in order to" ensure preclearance under § 5. And the court explained that even at trial, Hofeller had given testimony that undermined his "blame it on politics" claim. Right after asserting that Rucho and Lewis had told him "[not] to use race" in designing District 12, Hofeller added a qualification: "except perhaps with regard to Guilford County." As the District Court understood, that is the kind of "exception" that goes pretty far toward swallowing the rule. District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%. The District Court came away from Hofeller's self-contradictory testimony unpersuaded that this decisive influx of black voters was an accident. Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head, the court thought, Hofeller's denial of race-based districting "r[ang] hollow."

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design. His report, as the District Court held, thus tended to confirm the plaintiffs' direct evidence of racial predominance.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review. * * * * No doubt other interpretations of that evidence were permissible. Maybe we would have evaluated the testimony differently had we presided over the trial; or then again, maybe we would not have. Either way—and it is only this which matters—we are far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design.

B

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." That is true, the State says, irrespective of what other evidence is in the case—so even if the plaintiff offers powerful direct proof that the legislature adopted the map it did for racial reasons. Because the plaintiffs here (as all agree) did not present such a counter-map, North Carolina concludes that they cannot prevail. The dissent echoes that argument.

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were really sorting by political behavior instead of skin color (so the argument goes) you would have done —or, at least, could just as well have done—this. Such would-have, could-have, and (to round out the set) should-have arguments are a familiar means of undermining a claim that an action was based on a permissible, rather than a prohibited, ground. See, e.g., *Miller-El v. Dretke* (2005) ("If that were the [real] explanation for striking [juror] Warren[,] the prosecutors should have struck [juror] Jenkins" too).

But they are hardly the only means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's

design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. In *Bush v. Vera* (1996), for example, this Court upheld a finding of racial predominance based on "substantial direct evidence of the legislature's racial motivations"—including credible testimony from political figures and statements made in a § 5 preclearance submission—plus circumstantial evidence that redistricters had access to racial, but not political, data at the "block-by-block level" needed to explain their "intricate" designs (plurality opinion). Not a single Member of the Court thought that the absence of a counter-map made any difference. Similarly, it does not matter in this case, where the plaintiffs' introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.

A plaintiff's task, in other words, is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the "predominant consideration in deciding to place a significant number of voters within or without a particular district." That burden of proof, we have often held, is "demanding." And because that is so, a plaintiff will sometimes need an alternative map, as a practical matter, to make his case. But in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. See *Arlington Heights v. Metropolitan Housing Development Corp* (1977) (offering a varied and non-exhaustive list of "subjects of proper inquiry in determining whether racially discriminatory intent existed"). Nor would it make sense to do so here. The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim. * * * *

V

Applying a clear error standard, we uphold the District Court's conclusions that racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Carolina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court's decision that § 2 of the VRA gave North Carolina no good reason to reshuffle voters because of their race. We accordingly affirm the judgment of the District Court.

It is so ordered.

Justice Alito, with whom The Chief Justice and Justice Kennedy join, concurring in the judgment in part and dissenting in part. {Omitted; The opinion dissented as to District 12}.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes

1. The disagreement in *Cooper v. Harris* centered on District 12 and the legislative intent for the redistricting of District 12, and prompted a trading of literary allusions. In Alito's dissent, he writes:

Amazingly, a reader of the majority opinion (and the opinion of the District Court) would remain almost entirely ignorant of the legislature's political strategy and the relationship between that strategy and the racial composition of District 12. The majority's analysis is like Hamlet without the prince.

The Court's opinion by Justice Kagan, counters this in its footnote 6:

Justice Alito charges us with "ignor[ing]" the State's political-gerrymander defense, making our analysis "like Hamlet without the prince." But we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds). By contrast, the dissent consistently treats the State's version of events (what it calls "the Legislature's political strategy and the relationship between that strategy and [District 12's] racial composition,") as if it were a simple "fact of the matter"—the premise of, rather than a contested claim in, this case. The dissent's narrative thus tracks, top-to-bottom and point-for-point, the testimony of Dr. Hofeller, the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble. Compare *post*, at 12–20, with App. 2671–2755. Imagine (to update the dissent's theatrical reference) *Inherit the Wind* retold solely from the perspective of William Jennings Bryan, with nary a thought given to the competing viewpoint of Clarence Darrow.

2. As to the possibility of an Equal Protection Clause challenge to political or partisan gerrymandering, after sidestepping the question in several cases (including *Gill v. Whitford* (2018)), the United States Supreme Court's decision in *Rucho v. Common Cause* (2019) held that the judicial branch has no role in deciding issues of partisan gerrymandering. Writing for the 5 Justice majority, Chief Justice Roberts concluded that challenges to partisan gerrymandering involve a political question unsuitable for the courts because such issues lack "judicially discoverable and manageable standards for resolving them." Chief Justice Roberts recommended that state courts resolve the issue.

In dissent, Justice Kagan—joined by Justices Ginsburg, Breyer, and Sotomayor—began by stating "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks it is beyond its judicial capabilities." Kagan's impassioned dissent, as long as the majority opinion, and parts of which she read from the bench (a rare practice for her), explained that democracy is at stake and if "left unchecked, gerrymanders like the ones here may irreparably damage our system of government." As for standards, the four dissenters argued that courts have developed a framework for analyzing claims of partisan gerrymandering, including the workable standard the three-judge court in *Rucho* used to analyze North Carolina's redistricting and hold its partisan gerrymandering was so severe it violated the Equal Protection Clause. And regarding state courts, Kagan's opinion asked, "what do those courts know that this Court cannot? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?"

Voting and Equal Protection will be considered again in a later chapter.

Further Your Understanding

CALI Lesson: Affirmative Action and Equal Protection

CALI, The Center for Assisted Legal Instruction, has a lesson designed to assist and further your understanding of equal protection and affirmative action. The lesson treats the beginnings of affirmative action, the level of scrutiny that applies to affirmative action, the special context of affirmative action and education, and affirmative action and the political process, including redistricting.

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1.6: CHAPTER FIVE- Nonracial Classifications and Equal Protection – Part 1

I. Rational Basis Standard as Default

Railway Express Agency, Inc. v. New York
336 U.S. 106 (1949)

Justice Douglas delivered the opinion of the Court, in which Vinson, Black, Frankfurter, Murphy, Jackson, and Burton, JJ, joined. Rutledge, J., issued a brief concurring opinion. Jackson, J., issued a concurring opinion.

Mr. 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 judgment of conviction was sustained in the Court of Special Sessions. The Court of Appeals affirmed without opinion by a divided vote. The case is here on appeal.

* * * * {On the due process challenge, the Court stated:} We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

The question of equal protection of the laws is pressed more 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. * * * *

Affirmed.

Mr. Justice Rutledge acquiesces in the Court's opinion and judgment, dubitante on the question of equal protection of the laws.

Mr. 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. And I have frequently dissented when I thought local power was improperly denied.

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.

In this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its traffic, I should think it fully within its constitutional powers to forbid it all. The same would be true if the City should undertake to eliminate or minimize the hazard by any generally applicable restraint, such as limiting the size, color, shape or perhaps to some extent the contents of vehicular advertising. Instead of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. The same display, for example, advertising cigarettes, which this appellant is forbidden to carry on its trucks, may be carried on the trucks of a cigarette dealer and might on the trucks of this appellant if it dealt in cigarettes. And almost an identical advertisement, certainly one of equal size, shape, color and appearance, may be carried by this appellant if it proclaims its own offer to transport cigarettes. But it may not be carried so long as the message is not its own but a cigarette dealer’s offer to sell the same cigarettes.

The City urges that this applies equally to all persons of a permissible classification, because all that it does is (1) forbid all inhabitants of New York City from engaging in the business of selling advertising space on trucks which move as part of the city traffic; (2) forbid all truck owners from incidentally employing their vehicles for such purpose, with the exception that all truck

owners can advertise their own business on their own trucks. It is argued that, while this does not eliminate vehicular advertising, it does eliminate such advertising for hire and to this extent cuts down the hazard sought to be controlled.

That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. But it is usual to find such regulations applied to the very incidents wherein the two classes present different problems, such as in charges, liability and quality of service.

The difference, however, is invoked here to sustain a discrimination in a problem in which the two classes present identical dangers. The courts of New York have declared that the sole nature and purpose of the regulation before us is to reduce traffic hazards. There is not even a pretense here that the traffic hazard created by the advertising which is forbidden is in any manner or degree more hazardous than that which is permitted. 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. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. * * * *

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.

* * * * Of course, this appellant did not hold itself out to carry or display everybody's advertising, and its rental of space on the sides of its trucks was only incidental to the main business which brought its trucks into the streets. But it is not difficult to see that, in a day of extravagant advertising more or less subsidized by tax deduction, the rental of truck space could become an obnoxious enterprise. While I do not think highly of this type of regulation, that is not my business, and in view of the control I would concede to cities to protect citizens in quiet and orderly use for their proper purposes of the highways and public places, I think the judgment below must be affirmed.

Dandridge v Williams

397 U.S. 471 (1970)

Justice Stewart delivered the opinion of the Court in which Burger, C.J., and Black, Harlan, and White, JJ joined. Black., J. issued a concurring opinion in which Burger, C.J., joined. Harlan, J., issued a concurring opinion. Douglas., J., issued a dissenting opinion, in which Brennan, J., joined. Marshall, J., issued a dissenting opinion, in which Brennan, J., joined.

Mr. Justice Stewart delivered the opinion of the Court.

This case involves the validity of a method used by Maryland, in the administration of an aspect of its public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands. Like every other State in the Union, Maryland participates in the Federal Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. § 601 *et seq.* (1964 ed. and Supp. IV), which originated with the Social Security Act of 1935.

Under this jointly financed program, a State computes the so-called "standard of need" of each eligible family unit within its borders. Some States provide that every family shall receive grants sufficient to meet fully the determined standard of need. Other States provide that each family unit shall receive a percentage of the determined need. Still others provide grants to most families in full accord with the ascertained standard of need, but impose an upper limit on the total amount of money any one family unit may receive. Maryland, through administrative adoption of a "maximum grant regulation," has followed this last course. This suit was

brought by several AFDC recipients to enjoin the application of the Maryland maximum grant regulation on the ground that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment.

* * * *

The operation of the Maryland welfare system is not complex. By statute, the State participates in the AFDC program. It computes the standard of need for each eligible family based on the number of children in the family and the circumstances under which the family lives. In general, the standard of need increases with each additional person in the household, but the increments become proportionately smaller. The regulation here in issue imposes upon the grant that any single family may receive an upper limit of $250 per month in certain counties and Baltimore City, and of $240 per month elsewhere in the State. The appellees all have large families, so that their standards of need, as computed by the State, substantially exceed the maximum grants that they actually receive under the regulation. The appellees urged in the District Court that the maximum grant limitation operates to discriminate against them merely because of the size of their families, in violation of the Equal Protection Clause of the Fourteenth Amendment. They claimed further that the regulation is incompatible with the purpose of the Social Security Act of 1935, as well as in conflict with its explicit provisions.

In its original opinion, the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground. Both the statutory and constitutional issues have been fully briefed and argued here, and the judgment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution. We consider the statutory question first, because, if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA* (1936) (Brandeis, J., concurring).

I

{The Court found that the Maryland statute did not conflict with the Social Security Act}

II

Although a State may adopt a maximum grant system in allocating its funds available for AFDC payments without violating the Act, it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Maryland says that its maximum grant regulation is wholly free of any invidiously discriminatory purpose or effect, and that the regulation is rationally supportable on at least four entirely valid grounds. The regulation can be clearly justified, Maryland argues, in terms of legitimate state interests in encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families. The District Court, while apparently recognizing the validity of at least some of these state concerns, nonetheless held that the regulation "is invalid on its face for overreaching,"—that it violates the Equal Protection Clause "[b]ecause it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply. . . ." * * * * {T}he concept of "overreaching" has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.* (1955). That era long ago passed into history.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

The problems of government are practical ones, and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have, in the main, involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the

most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. It is a standard that has consistently been applied to State legislation restricting the availability of employment opportunities. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.

It is true that, in some AFDC families, there may be no person who is employable. It is also true that with respect to AFDC families whose determined standard of need is below the regulatory maximum, and who therefore receive grants equal to the determined standard, the employment incentive is absent. But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. * * * *

The judgment is reversed.

Mr. Justice Marshall, whom Mr. Justice Brennan joins, dissenting.

* * * * In the final analysis, Maryland has set up an AFDC program structured to calculate and pay the minimum standard of need to dependent children. Having set up that program, however, the State denies some of those needy children the minimum subsistence standard of living, and it does so on the wholly arbitrary basis that they happen to be members of large families. One need not speculate too far on the actual reason for the regulation, for in the early stages of this litigation the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance. Now, however, we are told that other rationales can be manufactured to support the regulation and to sustain it against a fundamental constitutional challenge.

However, these asserted state interests, which are not insignificant in themselves, are advanced either not at all or by complete accident by the maximum grant regulation. Clearly they could be served by measures far less destructive of the individual interests at stake. Moreover, the device assertedly chosen to further them is at one and the same time both grossly underinclusive-because it does not apply at all to a much larger class in an equal position-and grossly overinclusive-because it applies so strongly against a substantial class as to which it can rationally serve no end. Were this a case of pure business regulation, these defects would place it beyond what has heretofore seemed a borderline case, *see, e.g., Railway Express Agency v. New York* (1949), and I do not believe that the regulation can be sustained even under the Court's 'reasonableness' test.

In any event, it cannot suffice merely to invoke the spectre of the past and to recite from * * * * and *Williamson v. Lee Optical of Oklahoma, Inc*. to decide the case. Appellees are not a gas company or an optical dispenser; they are needy dependent children and families who are discriminated against by the State. The basis of that discrimination-the classification of individuals into large and small families-is too arbitrary and too unconnected to the asserted rationale, the impact on those discriminated against-the denial of even a subsistence existence-too great, and the supposed interests served too contrived and attenuated to meet the requirements of the Constitution. In my view Maryland's maximum grant regulation is invalid under the Equal Protection Clause of the Fourteenth Amendment.

Mr. Justice Douglas, dissenting {omitted}{arguing that Maryland scheme is invalid under federal Social Security Act}.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting {omitted}{arguing that Maryland scheme is invalid under federal Social Security Act}.

Check Your Understanding

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Notes

1. The lowest tier of Equal Protection judicial review is generally referred to as "rational basis" review. Under this standard, the government interest need only be legitimate and the means chosen reasonably (or rationally) related to that interest. The Courts in *Railway Express* and *Dandridge* are exceedingly deferential: even if the government interest is not entirely clear or logical, the Court will defer. In a more recent case, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), in an opinion by Justice Thomas, the Court went so far as to say that in "areas of social and economic policy, a statutory classification" should be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." However, this does not mean that classifications subject to rational basis review are always constitutional.

2. Both *Railway Express* and *Dandridge* make reference to the Court's role as not venturing to decide the wisdom of the legislative action under review. This is an allusion to the so-called *Lochner*-era of Due Process discussed in a subsequent chapter.

3. *Dandridge* cites the so-called "Ashwander doctrine," from *Ashwander v. TVA*, 297 U.S. 288 (1936), also known as constitutional avoidance. One might think of this as a component of judicial restraint or passive virtues. Under this principle, courts should decide cases on the narrower grounds of statutes before reaching the constitutional issues. Recall previous cases in which there has been a mix of statutory and constitutional claims in previous cases. How might you use the *Ashwander* doctrine as an attorney?

II. Sex/Gender Classifications

A. Early Cases

Note: Bradwell v. Illinois

In *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873), the issue before the Court was whether Illinois' denial of a license to practice law to "Mrs." Myra Bradwell because she was a married woman violated the Fourteenth Amendment. Rather than Equal Protection, the case rested on the Privileges or Immunities Clause and the Court relied on *The Slaughter-House Cases*, decided the day before, to hold that practicing law was not a one of the privileges or immunities protected by the Fourteenth Amendment (or by the Privileges and Immunities Clause of Article IV). The case, however, is most famous for the concurring opinion of Justice Bradley (the same Justice who wrote the Court's opinion in the *Civil Rights Cases*), which did not contain a single citation.

Mr. Justice Bradley [concurring]:

I concur in the judgment of the court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read. The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be admitted to practice as attorney or counsellor without having previously obtained a license for that purpose from two justices of the {state} Supreme Court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

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

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

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Mr. Justice Swayne and Mr. Justice Field concurred in the foregoing opinion of Mr. Justice Bradley.

The Chief Justice {Salmon Chase} dissented from the judgment of the court, and from all the opinions.

Note: Minor v. Happersett

In *Minor v. Happersett*, 88 U.S. (12 Wall.) 162 (1874), the issue was the constitutionality of a Missouri statute that provided, "Every male citizen of the United States shall be entitled to vote."

The case arose when

Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers, at the general election held in November, 1872, applied to one Happersett, the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a "male citizen of the United States," but a woman.

The Court declared that

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

Note that the Court stated that this citizenship flows from the Fourteenth Amendment’s first sentence, which reversed *Dred Scott*,and that this citizenship predates the Fourteenth Amendment, presumably limited to women who were not enslaved.

The Court, however, unanimously held that suffrage (the right to vote) was not within the Fourteenth Amendment’s protections, specifically privileges or immunities. In support, the Court pointed to the Fifteenth Amendment, which provides “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.” If the Fourteenth Amendment included the right to vote, the Court reasoned, there would have been no need for the Fifteenth.

The Court concluded:

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman’s need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

The Nineteenth Amendment providing for women’s suffrage was introduced in Congress a few years after *Minor*. It was submitted to the states for ratification in 1919 and adopted in 1920, 46 years after *Minor*.

Goesaert v. Cleary

335 U.S. 464 (1948)

Frankfurter, J. delivered the opinion of the Court in which Vinson, C.J., and Black, Reed, Jackson, and Burton, JJ., joined. Rutledge, J., filed a dissenting opinion, in which Douglas and Murphy, JJ., joined.

Mr. Justice Frankfurter delivered the opinion of the Court.

As part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed in all cities having a population of 50,000, or more, but no female may be so licensed unless she be ‘the wife or daughter of the male owner’ of a licensed liquor establishment. The case is here on direct appeal from an order of the District Court of three judges, * * * * denying an injunction to restrain the enforcement of the Michigan law. The claim, denied below, one judge dissenting, and renewed here, is that Michigan cannot forbid females generally from being barmaids and at the same time make an exception in favor of the wives and daughters of the owners of liquor establishments. Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it.

We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England. *See, e.g.*,Jusserand, English Wayfaring Life (1889). The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reasons. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that 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. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalties on the subject are not in dispute; their application turns peculiarly on the particular circumstances of a case. * * * *Suffice it to say that 'A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.'

Nor is it unconstitutional for Michigan to withdraw from women the occupation of bartending because it allows women to serve as waitresses where liquor is dispensed. The District Court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. Nothing need be added to what was said below as to the other grounds on which the Michigan law was assailed.

Judgment affirmed.

Mr. Justice Rutledge, with whom Mr. Justice Douglas and Mr. Justice Murphy join, dissenting.

While the equal protection clause does not require a legislature to achieve 'abstract symmetry' or to classify with 'mathematical nicety,' that clause does require lawmarkers to refrain from invidious distinctions of the sort drawn by the statute challenged in this case.

The statute arbitrarily discriminates between male and female owners of liquor establishments. A male owner, although he himself is always absent from his bar, may employ his wife and daughter as barmaids. A female owner may neither work as a barmaid herself nor employ her daughter in that position, even if a man is always present in the establishment to keep order. This inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids. Since there could be no other conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection.

B. Developing Intermediate Scrutiny

Reed v. Reed

404 U.S. 71 (1971)

Burger, C.J., delivered the opinion for a unanimous Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County, seeking appointment as administratrix of her son's estate. Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15-312 and 15-314 of the Idaho Code as the controlling statutes, and read those sections as compelling a preference for Cecil Reed because he was a male.

Section 15-312 designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled, and provides, in substance, that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section, then, appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 1314 provides, however, that

[o]f several persons claiming and equally entitled [under § 1312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15-312, and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15-314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15-314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment, and was, therefore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that, under § 15-312 "a father and mother are 'equally entitled' to letters of administration," but the preference given to males by § 15-314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine, and reject, Sally Reed's contention that § 15-314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators.

Sally Reed thereupon appealed for review by this Court * * * * and we noted probable jurisdiction. Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that, in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Railway Express Agency v. New York* (1949). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration, and thereby present the probate court "with the issue of which one should be named." The court also concluded that, where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives. . . ."

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. 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.

We note finally that, if § 15-314 is viewed merely as a modifying appendage to § 15-312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.

The judgment of the Idaho Supreme Court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Frontiero v. Richardson

411 U.S. 677 (1973)

Brennan, J., announced the Court's judgment and delivered an opinion, in which Douglas, White, and Marshall, JJ., joined. Stewart, J., filed a statement concurring in the judgment. Powell, J., filed an opinion concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. Rehnquist, J., filed a dissenting statement.

Mr. Justice Brennan announced the judgment of the Court and an opinion in which Mr. Justice Douglas, Mr. Justice White, and Mr. 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 under 37 U.S.C. 401, 403, and 10 U.S.C. 1072, 1076, 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. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. We noted probable jurisdiction. We reverse.

I

* * * * 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. Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. {footnote 5 states: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process,'" and includes a citation to *Bolling v. Sharpe* (1954)}.

In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "bread-winner" in the family – and the wife typically the "dependent" partner – "it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower."

II

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).

* * * * In reaching this result {in *Reed*}, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." This departure from "traditional" rational-basis analysis with respect to sex-based classifications is clearly justified.

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. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

". . . 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."

Bradwell v. State, 16 Wall. 130, 141 (1873) (Bradley, J., concurring).

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. *See generally*L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal, An American Dilemma 1073 (20th anniversary ed. 1962). 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. *See generally*K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

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 nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. 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.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Title VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

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.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, * * * * 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. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." *Reed v. Reed*.

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. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.

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. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable.

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." 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. On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." *Reed v. Reed*. 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.

Reversed.

Mr. Justice Powell, with whom The Chief Justice {Burger} and Mr. 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. *Reed v. Reed* (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. 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.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Mr. Justice Stewart concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution.Reed v. Reed.

Mr. Justice Rehnquist dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero v. Laird*, 341 F. Supp. 201 (1972).

Craig v. Boren

429 U.S. 190 (1976)

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Powell, and Stevens, JJ., joined, and in all but Part II-D of which Blackmun, J., joined. Powell, J. and Stevens, J. filed concurring opinions. Blackmun, J., filed a statement concurring in part. Stewart, J., filed an opinion concurring in the judgment. Burger, C. J. and Rehnquist, J. filed dissenting opinions.

Mr. Justice Brennan delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, Okla. Stat., Tit. 37, 241 and 245 (1958 and Supp. 1976), 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.

This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972, by appellant Craig, a male then between 18 and 21 years of age, and by appellant Whitener, a licensed vendor of 3.2% beer. The complaint sought declaratory and injunctive relief against enforcement of the gender-based differential on the ground that it constituted invidious

discrimination against males 18-20 years of age. A three-judge court convened sustained the constitutionality of the statutory differential and dismissed the action. We noted probable jurisdiction of appellants' appeal. We reverse.

I

We first address a preliminary question of standing * * * * {omitted; the Court found the claims could proceed.}

II

A

Before 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males. In contrast, females were held criminally responsible as adults at age 18 and males at age 16. After the Court of Appeals for the Tenth Circuit held in 1972, on the authority of *Reed v. Reed* (1971), that the age distinction was unconstitutional for purposes of establishing criminal responsibility as adults, the Oklahoma Legislature fixed age 18 as applicable to both males and females. In 1972, 18 also was established as the age of majority for males and females in civil matters, except that 241 and 245 of the 3.2% beer statute were simultaneously codified to create an exception to the gender-free rule.

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. {note: there is no citation here}. Thus, in *Reed*, the objectives of "reducing the workload on probate courts," and "avoiding intrafamily controversy," were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. *See, e. g., Stanley v. Illinois* (1972); *Frontiero v. Richardson* (1973); *cf. Schlesinger v. Ballard*, (1975). And only two Terms ago, *Stanton v. Stanton* (1975), expressly stating that *Reed v. Reed* was "controlling," held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds.

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, *Schlesinger v. Ballard*, concerning the financial position of servicewomen, *Frontiero v. Richardson*, and working women, *Weinberger v. Wiesenfeld* (1975), could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton v. Stanton*; *Taylor v. Louisiana* (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.

In this case, too, "*Reed*, we feel, is controlling . . .," *Stanton v. Stanton*. We turn then to the question whether, under *Reed*, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

B

The District Court recognized that *Reed v. Reed* was controlling. In applying the teachings of that case, the court found the requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the gender-based distinction was substantially related to achievement of that goal.

C

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 18-20-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. Conceding that "the case is not free from doubt," the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification."

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate – driving while under the influence of alcohol – the statistics broadly establish that .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 lever, 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 differential 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.

There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under *Reed*, Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age.

D

Appellees argue, however, that 241 and 245 enforce state policies concerning the sale and distribution of alcohol and by force of the Twenty-first Amendment should therefore be held to withstand the equal protection challenge. * * * *

In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.

We conclude that the gender-based differential contained in Okla. Stat., Tit. 37, 245 constitutes a denial of the equal protection of the laws to males aged 18-20and reverse the judgment of the District Court.

It is so ordered.

Mr. Justice Stevens, concurring.

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

In this case, the classification is not as obnoxious as some the Court has condemned, nor as inoffensive as some the Court has accepted. It is objectionable because it is based on an accident of birth, because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket, and because, to the extent it reflects any physical difference between males and females, it is actually perverse. The question then is whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.

The classification is not totally irrational. For the evidence does indicate that there are more males than females in this age bracket who drive and also more who drink. Nevertheless, there are several reasons why I regard the justification as unacceptable. It is difficult to believe that the statute was actually intended to cope with the problem of traffic safety, since it has only a minimal effect on access to a not very intoxicating beverage and does not prohibit its consumption. Moreover, the empirical data submitted by the State accentuate the unfairness of treating all 18-20-year-old males as inferior to their female counterparts. The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages. It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.

Mr. Justice Rehnquist, dissenting.

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." (emphasis added). 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 expounded in cases such as * * * * *Williamson v. Lee Optical Co*., (1955), and I believe that it is constitutional under that analysis.

I

In *Frontiero v. Richardson*, the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect classification for purposes of equal protection analysis. * * * *

Subsequent to *Frontiero*, the Court has declined to hold that sex is a suspect class, *Stanton v. Stanton* (1975) and no such holding is imported by the Court's resolution of this case. However, the Court's application here of an elevated or "intermediate" level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard. *Dandridge v. Williams* (1970); *Williamson v. Lee Optical Co*.

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny. There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.

The Court does not discuss the nature of the right involved, and there is no reason to believe that it sees the purchase of 3.2% beer as implicating any important interest, let alone one that is "fundamental" in the constitutional sense of invoking strict scrutiny. Indeed, the Court's accurate observation that the statute affects the selling but not the drinking of 3.2% beer, further emphasizes the limited effect that it has on even those persons in the age group involved. There is, in sum, nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.

It is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution. There being no such interest here, and there being no plausible argument that this is a discrimination against females, the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats gender classification as a talisman which – without regard to the rights involved or the persons affected – calls into effect a heavier burden of judicial review.

The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized – the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved – so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are "important," and which are not. As for the second part of the Court's new test, the Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is any rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb "substantially" requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them. And even if we manage to avoid both confusion and the mirroring of our own preferences in the development of this new doctrine, the thousands of judges in other courts who must interpret the Equal Protection Clause may not be so fortunate.

II

The applicable rational-basis test is one which "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. * * * *"

Our decisions indicate that application of the Equal Protection Clause in a context not justifying an elevated level of scrutiny does not demand "mathematical nicety" or the elimination of all inequality. Those cases recognize that the practical problems of government may require rough accommodations of interests, and hold that such accommodations should be respected unless no reasonable basis can be found to support them. *Dandridge v. Williams*. Whether the same ends might have been better or more precisely served by a different approach is no part of the judicial inquiry under the traditional minimum rationality approach. * * * *

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. In this situation, they could reasonably infer that the incidence of drunk driving is a good deal higher than the incidence of arrest.

And while, as the Court observes, relying on a report to a Presidential Commission which it cites in a footnote, such statistics may be distorted as a result of stereotyping, the legislature is not required to prove before a court that its statistics are perfect. In any

event, if stereotypes are as pervasive as the Court suggests, they may in turn influence the conduct of the men and women in question, and cause the young men to conform to the wild and reckless image which is their stereotype. * * * *

The Oklahoma Legislature could have believed that 18-20-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. The record does not give any good indication of the true proportion of males in the age group who drink and drive (except that it is no doubt greater than the 2% who are arrested), but whatever it may be I cannot see that the mere purchase right involved could conceivably raise a due process question. There being no violation of either equal protection or due process, the statute should accordingly be upheld.

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United States v. Virginia (VMI)

518 U.S. 515 (1996)

Ginsburg, J., delivered the opinion of the Court, in which Stevens, O'Connor, Kennedy, Souter, and Breyer, JJ., joined. Rehnquist, C. J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion. Thomas, J., took no part in the consideration or decision of the case.

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 undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II

A

From its establishment in 1839 as one of the Nation's first state military colleges, VMI has remained financially supported by Virginia and "subject to the control of the [Virginia] General Assembly," First southern college to teach engineering and industrial chemistry, VMI once provided teachers for the State's schools. Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery.

VMI today enrolls about 1,300 men as cadets. Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school

"to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril."

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "[o]nly about 15% of VMI cadets enter career military service."

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." As one Commandant of Cadets described it, the adversative method "dissects the young student," and makes him aware of his "limits and capabilities," so that he knows "how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted."

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors.

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "'does not lie, cheat, steal nor tolerate those who do.'"

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." "[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI]."

B

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Trial of the action consumed six days and involved an array of expert witnesses on each side.

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. "[S]ome women, at least," the court said, "would want to attend the school if they had the opportunity." The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"-"a sufficient 'critical mass' to provide the female cadets with a positive educational experience." And it was also established that "some women are capable of all of the individual activities required of VMI cadets." In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army."

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women v. Hogan* (1982), was the closest guide. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*. To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

The District Court reasoned that education in "a single-gender environment, be it male or female," yields substantial benefits. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the only means of achieving the objective "is to exclude women from the all-male institution-VMI."

* * * * The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the State's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: "'[I]t is extremely important that [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin.'" * * * * The parties agreed that "some women can meet the physical standards now imposed on men," and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program-physical training, the absence of privacy, and the adversative approach-would be materially affected by coeducation." Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the State: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. In May 1993, this Court denied certiorari.

C

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission-to produce "citizen-soldiers"-the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources.

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. Mary Baldwin's faculty holds "significantly fewer Ph.D.'s than the faculty at VMI," and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition.

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. Training its attention on methods of instruction appropriate for "most women," the Task Force determined that a military model would be "wholly inappropriate" for VWIL.

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, but the VWIL House would not have a military format, and VWIL would not require its students to eat meals together or to wear uniforms during the school day. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million. Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, but those graduates will not have the advantage afforded by a VMI degree.

D

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. The District Court again acknowledged evidentiary support for these determinations: "[T]he VMI methodology could be used to educate women and, in fact, some women . . . may prefer the VMI methodology to the VWIL methodology." But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." The court anticipated that the two schools would "achieve substantially similar outcomes." It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."

A divided Court of Appeals affirmed the District Court's judgment. * * * * "[P]roviding the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed; that objective, the court added, is "not pernicious." Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes."

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the State could not "accomplish [its] objective of providing single-gender education."

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypass[ing] any equal protection scrutiny." * * * *

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "'exceedingly persuasive [justification]'" for the State's action (quoting *Mississippi University for Women*). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the State's "actual overriding purpose." That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission." * * * *

The Fourth Circuit denied rehearing en banc. Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion. * * * * "Women need not be guaranteed equal 'results,'" Judge Motz said, "but the Equal Protection Clause does require equal opportunity . . . [and] that opportunity is being denied here."

III

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI-extraordinary opportunities for military training and civilian leadership development-deny to women "capable of all of the individual activities required of VMI cadets," the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, -as Virginia's sole single-sex public institution of higher education- offends the Constitution's equal protection principle, what is the remedial requirement?

IV

We note, once again, the core instruction of this Court's pathmarking decisions in *J. E. B. v. Alabama ex rel. T. B.* (1994), and *Mississippi Univ. for Women*: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson* (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. *See, e.g., Goesaert v. Cleary* (1948).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed*. Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. *See, e.g., Kirchberg v. Feenstra* (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton v. Stanton* (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). *See J. E. B.*,

(Kennedy, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. *See Mississippi Univ. for Women*. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger v. Wiesenfeld* (1975); *Califano v. Goldfarb* (1977) (Stevens, J., concurring in judgment).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia* (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States* (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster* (1977) (per curiam), to "promot[e] equal employment opportunity," see *California Federal Sav. & Loan Assn. v. Guerra* (1987), 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, *see Goesaert*, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia-the Mary Baldwin VWIL program-does not cure the constitutional violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

A

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." Undertaking a "searching analysis," the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification." Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the State established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting widely held views about women's proper place, the Nation's first universities and colleges-for example, Harvard in Massachusetts, William and Mary in Virginia-admitted only men. VMI was

not at all novel in this respect: In admitting no women, VMI followed the lead of the State's flagship school, the University of Virginia, founded in 1819. * * * *

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." Whatever internal purpose the Mission Study Committee served-and however well-meaning the framers of the report-we can hardly extract from that effort any state policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focuse[d] on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how th[e] conclusion was reached."

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan-a plan to "affor[d] a unique educational benefit only to males." However "liberally" this plan serves the State's sons, it makes no provision whatever for her daughters. That is not equal protection.

B

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia."

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program-physical training, the absence of privacy, and the adversative approach." And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that "the VMI methodology could be used to educate women." The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. "[S]ome women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets." The parties, furthermore, agree that "some women can meet the physical standards [VMI] now impose[s] on men." In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's raison d'étre, "nor VMI's implementing methodology is inherently unsuitable to women."

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." For example, "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere." "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception."

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed* (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*; *see J. E. B.* (equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women-or men-should be forced to attend VMI"; rather, the question is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which

"forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . [I]t arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to *grade up* the profession."

In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added).

* * * * Medical faculties similarly resisted men and women as partners in the study of medicine. ("'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system . . . .'")). More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity;" deprive male partners of adequate assistance; and lead to sexual misconduct. Field studies did not confirm these fears.

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The State's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, was bent and bowed.

The State'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 State's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier "citizen-soldier" corps. Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women*, 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 United States challenges this "remedial" ruling as pervasively misguided.

A

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of

[discrimination].” *See Milliken v. Bradley* (1977). The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. * * * *

Virginia chose not to eliminate, but to leave untouched, VMI’s exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution’s equal protection requirement, Virginia was obliged to show that its remedial proposal “directly address[ed] and relate[d] to” the violation, *see Milliken*, i.e., the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virginia described VWIL as a “parallel program,” and asserted that VWIL shares VMI’s mission of producing “citizen-soldiers” and VMI’s goals of providing “education, military training, mental and physical discipline, character . . . and leadership development.” * * * * In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. * * * *

Virginia maintains that these methodological differences are “justified pedagogically,” based on “important differences between men and women in learning and developmental needs,” “psychological and sociological differences” Virginia describes as “real” and “not stereotypes.” The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, “determined that a military model and, especially VMI’s adversative method, would be wholly inappropriate for educating and training most women.” * * * *

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 realties: 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.”

B

In myriad respects other than military training, VWIL does not qualify as VMI’s equal. VWIL’s student body, faculty, course offerings, and facilities hardly match VMI’s. Nor can the VWIL graduate anticipate the benefits associated with VMI’s 157-year history, the school’s prestige, and its influential alumni network. * * * *

Virginia’s VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court’s 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See *Sweatt v. Painter* (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Herman Sweatt and other black law students. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law “substantially equivalent to those offered by the State to white students at the University of Texas.” * * * * More important than the tangible features, the Court emphasized, are “those qualities which are incapable of objective measurement but which make for greatness” in a school, including “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.” Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown “substantial equality in the [separate] educational opportunities” the State offered. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the State supports at VWIL and VMI.

C

When Virginia tendered its VWIL plan, * * * * the Court of Appeals considered whether the State could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

* * * * In sum, Virginia's remedy does not match the constitutional violation; the State has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

VII

* * * * A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of "We the People" expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

For the reasons stated, the initial judgment of the Court of Appeals is affirmed, the final judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas took no part in the consideration or decision of this case.

Chief Justice Rehnquist, concurring in judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

* * * * [U]nlike the majority, I would consider only evidence that postdates our decision in {*Mississippi University for Women v.*} *Hogan*, and would draw no negative inferences from the State's actions before that time. I think that after *Hogan*, the State was entitled to reconsider its policy with respect to VMI, and to not have earlier justifications, or lack thereof, held against it.

Even if diversity in educational opportunity were the State's actual objective, the State's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When Hogan placed Virginia on notice that VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the State could have done to avoid an equal protection violation? Since the State did nothing, we do not have to definitively answer that question.

I do not think, however, that the State's options were as limited as the majority may imply. * * * * In the words of Grover Cleveland's second inaugural address, the State faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal Protection Clause, but, until the decision in *Hogan*, a condition which had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the State was faced with the stark choice of either admitting women to VMI, on the one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the State took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

* * * * It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall calibre.

If a state decides to create single-sex programs, the state would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the state should avoid assuming demand based on stereotypes; it must not assume a priori, without evidence, that there would be no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

Justice Scalia, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: it explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were-as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy-so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States-the old one-takes no sides in this educational debate, I dissent.

I

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal-protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," *Clark v. Jeter* (1988). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech {under the First Amendment} to disabilities attendant to illegitimacy, and to discrimination on the basis of sex.

I have no problem with a system of abstract tests such as rational-basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede-and indeed ought to be crafted so as to reflect-those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." The same applies, mutatis mutandis, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges-West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954-admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies), came not by court decree, but because the people, through their elected representatives, decreed a change. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by today's decision with the cut-off of all state and federal support. Government-run nonmilitary educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] [c]oeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." *Mississippi Univ. for Women v. Hogan* (1982) (Powell, J., dissenting). These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

II

To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as Justice O'Connor stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "[b]etween th[e] extremes of rational basis review and strict scrutiny." We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "substantially related to an important governmental objective."

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court avoids doing so. Notwithstanding our above-described precedents and their "'firmly established principles,'" the United States urged us to hold in this case "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in *Hogan*, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in *J. E. B. v. Alabama ex rel. T. B.*, and *Hogan*, would be unobjectionable if the Court acknowledged that whether a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

That is essential to the Court's result, which can only be achieved by establishing that intermediate scrutiny is not survived if there are some women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. * * * *

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one

would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in *Califano v. Webster* (1977) (per curiam), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women *on the average* received lower retirement benefits than men." The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In *Rostker v. Goldberg* (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." In *Metro Broadcasting, Inc. v. FCC* (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña* (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

Not content to execute a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even in principle, a higher standard (i.e., strict scrutiny) should apply. "The Court has," it says, "*thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin . . .," (emphasis added); and it describes our earlier cases as having done no more than decline to "equat[e] gender classifications, *for all purposes*, to classifications based on race or national origin" (emphasis added). The wonderful thing about these statements is that they are not actually false-just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications. And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law-not to muddy the waters, and not to exact over-compliance by intimidation. The States and the Federal Government are entitled to know before they act the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's. And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in *United States v. Carolene Products Co.* (1938), which said (intimatingly) that we did not have to inquire in the case at hand

whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

It is hard to consider women a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. *See, e.g.*, Equal Pay Act of 1963, 29 U. S. C. Section(s) 206(d); Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section(s) 2000e-2; Title IX of the Education Amendments of 1972, 20 U. S. C. Section(s) 1681; Women's Business Ownership Act of 1988, Pub. L. 100-533, 102 Stat. 2689; Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

III

With this explanation of how the Court has succeeded in making its analysis seem orthodox-and indeed, if intimations are to be believed, even overly generous to VMI-I now proceed to describe how the analysis should have been conducted. The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective."

A

It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a fact established in this case." * * * *

While no one questioned that for many students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

"One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees."

* * * * But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [i.e., adversative] program, the program would attract an insufficient number of participants to make the program work," and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether." Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

* * * * In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model-and to concentrate its resources in a single entity that serves both these interests in diversity-is substantially related to the State's important educational interests.

B

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this case, or both. * * * *

The Court argues that VMI would not have to change very much if it were to admit women. The principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss, that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "[T]he evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "[t]he intensity and aggressiveness of the current program"; and various modifications in other respects of the adversative training program which permeates student life. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's

program-physical training, the absence of privacy, and the adversative approach-would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training."

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "[t]he notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." The point about "downgrad[ing] VMI's stature" is a strawman; no one has made any such claim. The point about "destroy[ing] the adversative system" is simply false; the District Court not only stated that "[e]vidence supports this theory," but specifically concluded that while "[w]ithout a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." And the point about "destroy[ing] the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women and "would eventually find it necessary to drop the adversative system altogether."

Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. * * * *

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL because it is, under our established test, irrelevant, so long as VMI's all-male character is "substantially related" to an important state goal. But VWIL now exists, and the Court's treatment of it shows how far-reaching today's decision is.

C

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more implausible. * * * *

IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the case. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

A

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test-asking whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification-the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. * * * *

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. * * * *

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. * * * *

B

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to private single-sex education. Government support is immensely important to private educational institutions. * * * *

The issue will be not whether government assistance turns private colleges into state actors, but whether the government itself would be violating the Constitution by providing state support to single-sex colleges. * * * *

Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce

novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed.

* * * * Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period-piece, entitled "The Code of a Gentleman" * * * * I do not know whether the men of VMI lived by this Code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

Check Your Understanding

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C. Sex/Gender and "Difference"

Note: Feminist Theories

While one could consider the "Sex/Gender" cases litigated under the Equal Protection Clause as flowing from feminism, similar to the manner in which the race and ethnicity cases flowed from the "Civil Rights movement," there were several strands of feminism and feminists did not always agree on which cases should be litigated and what the outcome of those cases should be. In part, this was because there were laws that were deemed protective toward women as Justice Brennan noted in *Frontiero*: an "attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." But feminists were also divided on the meanings of equality, sex, gender, difference, and the role of law. Further, feminists were divided along lines of class, race, ethnicity, as well as politics. This produced a complex theoretical environment, but the theoretical perspectives can be simplified into three major approaches.

Liberal feminism, sometimes called formal equality, advocates that the law should treat men and women equally. Under this view, even a law that advantages or accommodates women should be subject to the same rigor resulting in unconstitutionally.

Cultural feminism advocates that the law should recognize biological differences between men and women, and, more controversially should also recognize socio-biological differences between men and women. Under this view, a law that distinguishes between women and men might be subject to the same rigor but might be constitutional.

Radical feminism, sometimes called dominance-feminism, advocates that the law should recognize – – – and work toward eliminating – – – the subordination of women to men; and further that the law should question maleness as the default neutral standard. Under this view, a law that subordinates women should be unconstitutional; a law that works toward ending that subordination should be constitutional.

Sometimes, these three theoretical approaches all lead to the same result: the unconstitutionality of the provision in *Frontiero* might be an example. Other times, especially when the underlying issues involve reproductive capabilities, or the affective qualities arguably rooted in reproductive capabilities (e.g., women are more nurturing), or sex, or sexual violence ("violence against women"), the perspectives – – – which would not necessarily be advocated by "feminists" – – – support conflicting approaches and outcomes. Two controversial cases are illustrative.

In ***Geduldig v. Aiello***, 417 U.S. 484 (1974), the Court considered an Equal Protection Clause challenge to a provision in the California Unemployment Compensation Disability program that excluded pregnancy and pregnancy-related conditions from coverage. In an opinion for the Court for Justice Stewart, reversing the lower court, the Court held the California program constitutional. In footnote 20, the Court explained:

The dissenting opinion {by Brennan, J., and joined by Douglas and Marshall, J.J.} to the contrary, this case is thus a far cry from cases like *Reed v. Reed* (1971), and *Frontiero v. Richardson* (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that

distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

In ***Michael M. v. Superior Court of Sonoma County***, 450 U.S. 464 (1981), at issue was whether California's "statutory rape" law, which defined 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" violated the Equal Protection Clause. The Court upheld the statute. Writing for the plurality, Justice Rehnquist acknowledged the applicability of intermediate scrutiny standard of *Craig v. Boren*, but reasoned that the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same" and that the Court has upheld "statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Justice Rehnquist's opinion concluded that the state's interest in preventing teenage pregnancy was "strong." As to the means chosen – – – the criminalization of only males – – – it reasoned:

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.

Concurring in the opinion, Justice Blackmun stated that "I think too that it is only fair, with respect to this particular petitioner, to point out that his partner, Sharon, appears not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978." Blackmun's footnote to that statement included testimony by Sharon from the trial transcript that included this:

"Q. You said that he hit you?"

"A. Yeah."

"Q. How did he hit you?"

"A. He slugged me in the face."

"Q. With what did he slug you?"

"A. His fist."

"Q. Where abouts in the face?"

"A. On my chin."

"Q. As a result of that, did you have any bruises or any kind of an injury?"

"A. Yeah."

"Q. What happened?"

"A. I had bruises."

"The Court: Did he hit you one time or did he hit you more than once?"

"The Witness: He hit me about two or three times."

Consider how these different feminist theoretical perspectives are implicit in the Court's most recent sex/gender equal protection decision, *Sessions v. Morales-Santana*.

Sessions v. Morales-Santana

582 U.S. ___ (2017)

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in the judgment in part, in which Alito, J., joined. Gorsuch, J., took no part in the consideration or decision of the case.

Justice Ginsburg delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U. S. citizenship by a child born abroad, when one parent is a U. S. citizen, the other, a citizen of another nation. The main rule appears in 8 U. S. C. § 1401(a)(7) (1958 ed.), now § 1401(g) (2012 ed.). Applicable to married couples, § 1401(a)(7) requires a period of physical presence in the United States for the U. S.-citizen parent. The requirement, as initially prescribed, was ten years' physical presence prior to the child's birth, § 601(g) (1940 ed.); currently, the requirement is five years prebirth, § 1401(g) (2012 ed.). That main rule is rendered applicable to unwed U. S.-citizen fathers by § 1409(a). Congress ordered an exception, however, for unwed U. S.-citizen mothers. Contained in § 1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón Morales-Santana, was born in the Dominican Republic when his father was just 20 days short of meeting § 1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic, Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." Nevertheless, we cannot convert § 1409(c)'s exception for unwed mothers into the main rule displacing § 1401(a)(7) (covering married couples) and § 1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.

I

A

We first describe in greater detail the regime Congress constructed. * * * * {omitted}

B

Respondent Luis Ramón Morales-Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U. S. citizenship at birth based on the citizenship of his biological father, José Morales, who accepted parental responsibility and included Morales-Santana in his household.

José Morales was born in Guánica, Puerto Rico, on March 19, 1900. Puerto Rico was then, as it is now, part of the United States, and José became a U. S. citizen. After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday, therefore failing to satisfy § 1401(a)(7)'s requirement of five years' physical presence after age 14. He did so to take up employment as a builder-mechanic for a U. S. company in the then-U. S.-occupied Dominican Republic.

By 1959, José attested in a June 21, 1971 affidavit presented to the U. S. Embassy in the Dominican Republic, he was living with Yrma Santana Montilla, a Dominican woman he would eventually marry. In 1962, Yrma gave birth to their child, respondent Luis Morales-Santana. While the record before us reveals little about Morales-Santana's childhood, the Dominican archives disclose that Yrma and José married in 1970, and that José was then added to Morales-Santana's birth certificate as his father. José also related in the same affidavit that he was then saving money "for the susten[ance] of [his] family" in anticipation of undergoing surgery in Puerto Rico, where members of his family still resided. In 1975, when Morales-Santana was 13, he moved to Puerto Rico, and by 1976, the year his father died, he was attending public school in the Bronx, a New York City borough.

C

In 2000, the Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 17, 1995. Morales-Santana ranked as an alien despite the many years he lived

in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales-Santana's claim to citizenship derived from the U. S. citizenship of his father, and ordered Morales-Santana's removal to the Dominican Republic. In 2010, Morales-Santana moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. The Board of Immigration Appeals (BIA) denied the motion. The United States Court of Appeals for the Second Circuit reversed the BIA's decision. Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. To cure the constitutional flaw, the court further held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen. In so ruling, the Second Circuit declined to follow the conflicting decision of the Ninth Circuit in *United States* v. *Flores-Villar* (2008). We granted certiorari in *Flores-Villar*, but ultimately affirmed by an equally divided Court. *Flores-Villar* v. *United States* (2011) (*per curiam*). Taking up Morales-Santana's request for review, we consider the matter anew.

II

Because § 1409 treats sons and daughters alike, Morales-Santana does not suffer discrimination on the basis of *his* gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U. S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales-Santana may seek to vindicate his father's right to the equal protection of the laws. * * * * Morales-Santana is thus the "obvious claimant," the "best available proponent," of his father's right to equal protection.

III

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. See, *e.g.*, *Hoyt* v. *Florida* (1961) (women are the "center of home and family life," therefore they can be "relieved from the civic duty of jury service"); *Goesaert* v. *Cleary* (1948) (States may draw "a sharp line between the sexes"). Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." *J. E. B.* v. *Alabama ex rel. T. B.* (1994); *United States* v. *Virginia*, 518 U. S. 515 –556 (1996) (state-maintained military academy may not deny admission to qualified women).

Laws granting or denying benefits "on the basis of the sex of the qualifying parent," our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. *Califano* v. *Westcott*, (1979) (holding unconstitutional provision of unemployed-parent benefits exclusively to fathers); *Califano* v. *Goldfarb* (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survivors' benefits available to widows); *Weinberger* v. *Wiesenfeld* (1975) (holding unconstitutional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); *Frontiero* v. *Richardson* (1973) (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); cf. *Reed* v. *Reed* (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child's estate).

Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification." *Virginia*.

A

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia* (quoting *Mississippi Univ. for Women* v. *Hogan* (1982)). Moreover, the classification must substantially serve an important governmental interest *today*, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell* v. *Hodges* (2015). Here, the Government has supplied no "exceedingly persuasive justification," for § 1409(a) and (c)'s "gender-based" and "gender-biased" disparity.

1

History reveals what lurks behind § 1409. Enacted in the Nationality Act of 1940, § 1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents. During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. "[D]ominance [of] the husband," this Court observed in 1915, "is an ancient principle of our jurisprudence." *Mackenzie* v. *Hare* (1915). Through the early 20th century, a male citizen automatically conferred U. S. citizenship on his alien wife. A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien. The family of a citizen or a lawfully admitted permanent resident enjoyed statutory exemptions from entry requirements, but only if the citizen or resident was male. And from 1790 until 1934, the foreign-born child of a married couple gained U. S. citizenship only through the father.

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." 2 J. Kent, Commentaries on American Law (8th ed. 1854). In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed § 1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian."

This unwed-mother-as-natural-guardian notion renders § 1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture.

2

For close to a half century, as earlier observed, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." In particular, we have recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate."

In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives. Laws according or denying benefits in reliance on "[s]tereotypes about women's domestic roles," the Court has observed, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." Correspondingly, such laws may disserve men who exercise responsibility for raising their children. In light of the equal protection jurisprudence this Court has developed since 1971, § 1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

B

In urging this Court nevertheless to reject Morales-Santana's equal protection plea, the Government cites three decisions of this Court: *Fiallo* v. *Bell* (1977), *Miller* v. *Albright* (1998) and *Nguyen* v. *INS* (2001). None controls this case.

The 1952 Act provision at issue in *Fiallo* gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. Unwed fathers and their children,

asserting their right to equal protection, sought the same preferences. Applying minimal scrutiny (rational-basis review), the Court upheld the provision, relying on Congress' "exceptionally broad power" to admit or exclude aliens. This case, however, involves no entry preference for aliens. Morales-Santana claims he is, and since birth has been, a U. S. citizen. Examining a claim of that order, the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review.

The provision challenged in *Miller* and *Nguyen* as violative of equal protection requires unwed U. S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U. S. citizenship to those children. After *Miller* produced no opinion for the Court, we took up the issue anew in *Nguyen*. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. Morales-Santana's challenge does not renew the contest over § 1409's paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government does not dispute that Morales-Santana's father, by marrying Morales-Santana's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his]child." And unlike *Nguyen*'s parental-acknowledgment requirement, § 1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as "minimal."

C

Notwithstanding § 1409(a) and (c)'s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a connection between the child to become a citizen and the United States and (2) preventing "statelessness," *i.e.*, a child's possession of no citizenship at all. Even indulging the assumption that Congress intended § 1409 to serve these interests, neither rationale survives heightened scrutiny.

1

We take up first the Government's assertion that § 1409(a) and (c)'s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U. S. values than unmarried women do. Instead, it presents a novel argument, one it did not advance in *Flores-Villar*.

An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth. An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. Congress, the Government suggests, designed the statute to bracket an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens, and to align an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien.

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U. S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U. S.-citizen fathers, but not unwed U. S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. Lump characterization of that kind, however, no longer passes equal protection inspection.

Accepting, *arguendo*, that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end. The scheme permits the transmission of citizenship to children who have no tie to the United States so long as their mother was a U. S. citizen continuously present in the United States for one year at any point in her life *prior* to the child's birth. The transmission holds even if the mother marries the child's alien father immediately after the child's birth and never returns with the child to the United States. At the same time, the legislation precludes citizenship transmission by a U. S.-citizen father who falls a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledges paternity on the day of the child's birth and raises the child in the United States. One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny.

2

The Government maintains that Congress established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U. S.-citizen mother than it was for the foreign-born child of an unwed U. S.-citizen father. But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." Reducing the incidence of statelessness was the express goal of *other* sections of the 1940 Act. The justification for § 1409's gender-based dichotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "*post hoc* in response to litigation." *Virginia*.

Infecting the Government's risk-of-statelessness argument is an assumption without foundation. "[F]oreign laws that would put the child of the U. S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would *protect* the child of the U. S.-citizen father against statelessness by providing that the child would take his mother's citizenship." The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child.

Experts who have studied the issue report that, at the time relevant here, in "at least thirty countries," citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother's country. "[A]s many as forty-five countries," they further report, "did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father." In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. Taking account of the foreign laws actually in force, these experts concluded, "the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U. S. mothers." One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U. S.-citizen mothers while ignoring the same risk for children of unwed U. S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. Cognizant that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the Commissioner has made a key component of its project the elimination of gender discrimination in such laws. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no "exceedingly persuasive" justification for § 1409(a) and (c)'s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserves for unwed mothers.

There are "two remedial alternatives," our decisions instruct, when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." "How equality is accomplished . . . is a matter on which the Constitution is silent." The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand.

Ordinarily, we have reiterated, "extension, rather than nullification, is the proper course." Illustratively, in a series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended. See e.g., * * * * *Department of Agriculture* v. *Moreno* (1973) (food stamps); *Frontiero* (plurality opinion) (military spousal benefits). Here, however, the discriminatory exception consists of *favorable* treatment for a discrete group (a shorter physical-presence requirement for unwed U. S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases—striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group. * * * *

The residual policy here, the longer physical-presence requirement stated in §§ 1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." And the potential for "disruption of the statutory scheme" is large. For if § 1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U. S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress.

Although extension of benefits is customary in federal benefit cases, all indicators in this case point in the opposite direction. Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.

V

The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." Although the preferred rule in the typical case is to extend favorable treatment, this is hardly the typical case. Extension here would render the special treatment Congress prescribed in § 1409(c), the one-year physical-presence requirement for U. S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U. S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers.

The judgment of the Court of Appeals for the Second Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch took no part in the consideration or decision of this case.

Justice Thomas, with whom Justice Alito joins, concurring in the judgment in part. {Given the conclusion that no relief was warranted, there was no need to find the statute unconstitutional.}

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Notes

1. Be prepared to articulate the standard of review for Equal Protection classifications based on sex/gender including the *United States v. Virginia* (VMI) language.

2. In *Morales-Santana*, the Court agreed with the challenger's claim that the statute is unconstitutional and yet the challenger does not prevail. Why not?

3. Reconsidering the standard of review for sex/gender and anticipating other classifications, review *Carolene Products* footnote 4 and the evolving criteria for determining whether or not a classification is suspect (or quasi-suspect) as a prerequisite to

determining the applicable standard of review.

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1.7: CHAPTER FIVE- Nonracial Classifications and Equal Protection – Part 2

III. Other Classifications

A. Illegitimacy, Age, and Language

Note: Illegitimacy

In *Sessions v. Morales-Santana*, there is also an issue of "illegitimacy," or "non-marital children," the status of being born to an unmarried woman. At times, such classifications can also be sex/gender classifications, as in *Morales-Santana*, because the classification also involves treating unmarried mothers differently than unmarried fathers with regard to the child. Indeed, there is a constellation of cases often known as the "unmarried father" cases which involve parental rights and obligations of fathers. For example, in *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court held that an unmarried biological father who did not acknowledge the child was not denied equal protection (or due process) when the mother's subsequent husband adopted the child.

Other cases involve a claim by an "illegitimate" child more directly. For example, in *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court in a very brief opinion held unconstitutional the exclusion of illegitimate children from the right to bring an action for their mother's wrongful death. The state courts had interpreted "child" in the wrongful death statute to mean "legitimate child," and the denial to illegitimate children of "the right to recover" justified as "based on morals and general welfare because it discourages bringing children into the world out of wedlock." Justice Douglas, writing for the Court, first emphasized that "illegitimate" children are persons within the Equal Protection Clause, then wrote:

Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How, under our constitutional regime, can he be denied correlative rights which other citizens enjoy?

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death, they suffered wrong in the sense that any dependent would.

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.

{footnotes omitted}

In *Clark v. Jeter*, 486 U.S. 456 (1988), in an opinion by Justice O'Connor, the Court explicitly stated that classifications based on illegitimacy generally merit intermediate scrutiny:

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently, we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust."

Note: Age

Generally, the Court has decided that age classifications merit only rational basis review.

Regarding younger people, the Court in *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), applied rational basis review to uphold the constitutionality of an ordinance that licensed a class of dancehalls that restricted admission to persons between the ages of 14 and 18 and limited their hours of operation. Without much analysis, the opinion by Chief Justice Rehnquist for the Court assumed that teenagers were not a suspect class (the major issue was whether there was a First Amendment right of association). Protecting the 14-18 year olds from "the corrupting influences of older teenagers and young adults," was a legitimate interest and the means chosen was sufficiently rational.

As to older people, the Court in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), upheld a mandatory retirement age of 50 for police officers. In its per curiam opinion considering what level of scrutiny should apply, the Court stated:

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. {We have} observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

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.*, n. 4 (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.

Under the circumstances, it is unnecessary to subject the State's resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as "strict judicial scrutiny."

Applying rational basis, the Court found that the statute "clearly meets" the standard. The Court articulated the government interest as seeking to "protect the public by assuring physical preparedness of its uniformed police." It found that the "mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age." The Court did acknowledge that individualized testing might be a better method, but that did not mean it was irrational. The Court added: "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."

Hernandez v. New York

500 U.S. 352 (1991)

Kennedy, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C.J., and White and Souter, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment, in which Scalia, J., joined. Blackmun, J., filed a dissenting opinion. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined.

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice White and Justice Souter join.

Petitioner Dionisio Hernandez asks us to review the New York state courts' rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. If true, the prosecutor's discriminatory use of peremptory strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson v. Kentucky* (1986). We must determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors and, if so, whether the state courts' decision to accept the prosecutor's explanation should be sustained.

Petitioner and respondent both use the term "Latino" in their briefs to this Court. The *amicus* brief employs instead the term "Hispanic," and the parties referred to the excluded jurors by that term in the trial court. Both words appear in the state-court opinions. No attempt has been made at a distinction by the parties, and we make no attempt to distinguish the terms in this opinion. We will refer to the excluded venirepersons as Latinos in deference to the terminology preferred by the parties before the Court.

I

The case comes to us on direct review of petitioner's convictions on two counts of attempted murder and two counts of criminal possession of a weapon. On a Brooklyn street, petitioner fired several shots at Charlene Calloway and her mother, Ada Saline. Calloway suffered three gunshot wounds. Petitioner missed Saline, and instead hit two men in a nearby restaurant. The victims survived the incident.

The trial was held in the New York Supreme Court, Kings County. We concern ourselves here only with the jury selection process and the proper application of *Batson*, which had been handed down before the trial took place. After 63 potential jurors had been questioned and 9 had been empaneled, defense counsel objected that the prosecutor had used four peremptory challenges to exclude Latino potential jurors. Two of the Latino venirepersons challenged by the prosecutor had brothers who had been convicted of crimes, and the brother of one of those potential jurors was being prosecuted by the same District Attorney's office for a probation violation. Petitioner does not press his *Batson* claim with respect to those prospective jurors, and we concentrate on the other two excluded individuals.

After petitioner raised his *Batson* objection, the prosecutor did not wait for a ruling on whether petitioner had established a prima facie case of racial discrimination. Instead, the prosecutor volunteered his reasons for striking the jurors in question. He explained:

"Your honor, my reason for rejecting the – these two jurors – I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter."

After an interruption by defense counsel, the prosecutor continued:

"We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that, in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury."

Defense counsel moved for a mistrial "based on the conduct of the District Attorney," and the prosecutor requested a chance to call a supervisor to the courtroom before the judge's ruling.

Following a recess, defense counsel renewed his motion, which the trial court denied. Discussion of the objection continued, however, and the prosecutor explained that he would have no motive to exclude Latinos from the jury:

"[T]his case, involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are going to be Hispanic. I have absolutely no reason – there's no reason for me to want to exclude Hispanics, because all the parties involved are Hispanic, and I certainly would have no reason to do that."

After further interchange among the judge and attorneys, the trial court again rejected petitioner's claim.

On appeal, the New York Supreme Court, Appellate Division, noted that, though the ethnicity of one challenged bilingual juror remained uncertain, the prosecutor had challenged the only three prospective jurors with definite Hispanic surnames. The court ruled that this fact made out a prima facie showing of discrimination. The court affirmed the trial court's rejection of petitioner's *Batson* claim, however, on the ground that the prosecutor had offered race-neutral explanations for the peremptory strikes sufficient to rebut petitioner's prima facie case.

The New York Court of Appeals also affirmed the judgment, holding that the prosecutor had offered a legitimate basis for challenging the individuals in question and deferring to the factual findings of the lower New York courts. Two judges dissented, concluding that, on this record, analyzed in the light of standards they would adopt as a matter of state constitutional law, the prosecutor's exclusion of the bilingual potential jurors should not have been permitted. We granted certiorari and now affirm.

II

In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. * * * *

A.

{discussion of procedural posture omitted}

B

Petitioner contends that the reasons given by the prosecutor for challenging the two bilingual jurors were not race neutral. In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the

peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. * * * *

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish. He points to the high correlation between Spanish-language ability and ethnicity in New York, where the case was tried. We need not address that argument here, for the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony.

The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause.

Petitioner contends that despite the prosecutor's focus on the individual responses of these jurors, his reason for the peremptory strikes has the effect of a pure, language-based reason, because "[a]ny honest bilingual juror would have answered the prosecutor in the exact same way." Petitioner asserts that a bilingual juror would hesitate in answering questions like those asked by the judge and prosecutor due to the difficulty of ignoring the actual Spanish-language testimony. In his view, no more can be expected than a commitment by a prospective juror to try to follow the interpreter's translation. * * * *

C.

{discussion of trial judge's findings and standard on review omitted}

D.

Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer,* 6 J. Multilingual & Multicultural Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sanchez, *Our Linguistic and Social Context*, in Spanish in the United States 9, 12 (J. Amastae & L. Elias-Olivares eds. 1982); Dodson, *Second Language Acquisition and Bilingual Development: A Theoretical Framework,* 6 J. Multilingual & Multicultural Development 325, 326-327 (1985).

Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases. It is a harsh paradox that one may become proficient enough in English to participate in trial, see, e.g., 28 U.S.C. 1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer v. Nebraska* (1923).

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges

with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. *Cf. Yu Cong Eng v. Trinidad* (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer v. Nebraska* (striking down law prohibiting grade schools from teaching languages other than English). And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.

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Notes

1. *Hernandez v. New York* implicitly rejects the argument that Spanish-speakers constitute a racial (or national origin) classification and implicitly rejects the argument that Spanish-speakers would be a group that would merit other than rational basis scrutiny. How would you argue otherwise? Does this apply to all language groups in the United States?

2. In an earlier case, *Hernandez v. Texas*, 347 U.S. 475 (1974), the Court held that the "systematic exclusion" of "Mexicans" from the juror pool violated the Equal Protection Clause.

Although 14% of the county population were persons with "Mexican or Latin American surnames," the state stipulated that "for the last twenty-five years, there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." Writing for the Court, Chief Justice Warren relied on *Strauder v. West Virginia* (1880) and stated:

The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view. * * * * Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and, from time to time, other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

* * * * The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites." One method by which this may be demonstrated is by showing the attitude of the community. Here, the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

B. Classifications Based on Animus

United States Dept. of Agriculture v. Moreno

413 U.S. 528 (1973)

Brennan, J., delivered the opinion of the Court, in which Douglas, Stewart, White, Marshall, Blackmun, and Powell, JJ., joined. Douglas, J., filed a concurring opinion. Rehnquist, J., filed a dissenting opinion, in which Burger, C. J., joined.

Mr. 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, 7 U.S.C. 2012 (e), as amended in 1971, 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. A three-judge District Court for the District of Columbia held this classification invalid as violative of the Due Process Clause of the Fifth Amendment. We noted probable jurisdiction. We affirm.

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. * * * *

These and two other groups of appellees instituted a class action against the Department of Agriculture, its Secretary, and two other departmental officials, seeking declaratory and injunctive relief against the enforcement of the 1971 amendment of § 3(e) and its implementing regulations. In essence, appellees contend, and the District Court held, that the "unrelated person" provision of § 3(e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. We agree.

II

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Dandridge v. Williams* (1970). The purposes of the Food Stamp Act were expressly set forth in the congressional "declaration of policy":

"It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that

increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade."

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, § 5(c) of 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, §§ 14(b) and (c) specifically impose 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. * * * * Thus, in 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.'" *Dandridge v. Williams*. But the classification here in issue is not only "imprecise," it is wholly without any rational basis. The judgment of the District Court holding the "unrelated person" provision invalid under the Due Process Clause of the Fifth Amendment is therefore

Affirmed.

Mr. Justice Douglas, concurring {omitted}.

Mr. Justice Rehnquist, with whom The Chief Justice concurs, dissenting.

* * * * 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.

I do not believe that asserted congressional concern with the fraudulent use of food stamps is, when interpreted in the light most favorable to sustaining the limitation, quite as irrational as the Court seems to believe. * * * *

Check Your Understanding

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City of Cleburne v. Cleburne Living Center

473 U.S. 432 (1985)

White, J., delivered the opinion of the Court, in which Burger, C. J., and Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Stevens, J., filed a concurring opinion, in which Burger, C. J., joined. Marshall, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Brennan and Blackmun, JJ., joined.

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. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions." The city had determined that the proposed group home should be classified as a "hospital for the feeble-minded." After holding a public hearing on CLC's application, the City Council voted 3 to 1 to deny a special use permit.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, inter alia, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found 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," and that the City Council's decision "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under intermediate-level scrutiny. Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of "unfair and often grotesque mistreatment" of the retarded, discrimination against them was "likely to reflect deep-seated prejudice." In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this

case, because the city's ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community. Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied. Rehearing *en banc* was denied with six judges dissenting in an opinion urging en banc consideration of the panel's adoption of a heightened standard of review. We granted certiorari.

II

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. * * * * The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. * * * *

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson* (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi University for Women v. Hogan* (1982); *Craig v. Boren* (1976). Because illegitimacy is beyond the individual's control and bears "no relation to the individual's ability to participate in and contribute to society," official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest."

We have declined, however, to extend heightened review to differential treatment based on age: * * * * *Massachusetts Board of Retirement v. Murgia* (1976). The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, 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, see 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, 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." Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6010(1), (2). In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, "to the maximum extent appropriate," is integrated with that of nonmentally retarded children. Education of the Handicapped Act, 20 U.S.C. 1412(5) (B). The Government has also facilitated the hiring of the mentally retarded into the federal civil service by exempting them from the requirement of competitive examination. See 5 CFR 213.3102(t) (1984). The State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them, such as "the right to live in the least restrictive setting appropriate to [their] individual needs and abilities," including "the right to live . . . in a group home." Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann., Art. 5547-300, 7 (Vernon Supp. 1985).

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. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. 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.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

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. See *United States Dept. of Agriculture v. Moreno* (1973). Furthermore, some objectives – such as "a bare . . . desire to harm a politically unpopular group," – are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

IV

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.

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." *Palmore v. Sidoti* (1984).

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.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

Check Your Understanding

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Notes

1. Be prepared to articulate the criteria the Court in *Cleburne* uses to determine whether or not the classification is one which merits heightened scrutiny.

2. Dissenting in part, Justice Marshall, joined by Brennan and Blackmun argued that the Court was actually employing heightened review and that the classification deserved intermediate scrutiny. Footnote 24 of Justice Thurgood Marshall's opinion is instructive:

No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The "political powerlessness" of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances. The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process. The discreteness and insularity warranting a "more searching judicial inquiry," *United States v. Carolene Products Co*. n. 4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner* (1921) (Holmes, J.).

3. Be prepared to articulate the difference between “facial” and “as applied” challenges to the constitutionality of a statute, ordinance, or policy.

Romer v. Evans

517 U.S. 620 (1996)

Kennedy, J., delivered the opinion of the Court, in which Stevens, O’Connor, Souter, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined.

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 provi-sion of Colorado’s Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as “Amendment 2,” its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.

What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.
Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing.

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. To reach this conclusion, the state court relied on our voting rights cases, *e.g., Reynolds* v. *Sims* (1964), and on our precedents involving discriminatory restructuring of governmental decisionmaking, see, *e.g., Hunter* v. *Erickson* (1969); *Washington* v. *Seattle School Dist. No. 1* (1982). On remand, the State advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court * * * * {concluding that} "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. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that 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. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. * * * *

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind."

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited anti discrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado Executive Order D0035 (1990), which forbids employment discrimination against " 'all state employees, classified and exempt' on the basis of sexual orientation." Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." The repeal of these measures and the prohibition against their future reenactment demonstrates that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. * * * * In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy

or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass.* v. *Feeney* (1979). 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 that 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* (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc.* v. *New York* (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain that there existed 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. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" *Sweatt* v. *Painter* (1950) (quoting *Shelley* v. *Kraemer* (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' " *Skinner* v. *Oklahoma ex rel. Williamson* (1942) (quoting *Yick Wo* v. *Hopkins* (1886)).

Davis v. *Beason* (1890), not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the

statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See *Richardson* v. *Ramirez* (1974).

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). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ." *Civil Rights Cases* (1883).

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

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. I vigorously dissent.

Let me first discuss Part II of the Court's opinion, its longest section, which is devoted to rejecting the State's arguments that Amendment 2 "puts gays and lesbians in the same position as all other persons," and "does no more than deny homosexuals special rights." * * * *

Despite all of its hand wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the * * * only denial of equal treatment [the majority] contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal

protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (*i.e.*, by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.

The Court might reply that the example I have given is *not* a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the *substantive discrimination* against relatives (*i.e.*, the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the *electoral procedural discrimination* against them (*i.e.*, the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral procedural discrimination" has not hitherto been heard of: a law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers* v. *Hardwick* (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. * * * *

* * * * But assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual-orientation" is an acceptable stand in for homosexual conduct. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect," *Dandridge* v. *Williams* (1970). Just as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because *some* methadone users pose no threat to passenger safety, see *New York City Transit Authority* v. *Beazer* (1979), and just as a mandatory retirement age of 50 for police officers does not violate equal protection even though it prematurely ends the careers of many policemen over 50 who still have the capacity to do the job, see *Massachusetts Bd. of Retirement* v. *Murgia* (1976) *(per curiam)*, Amendment 2 is not constitutionally invalid simply because it could have been drawn more precisely so as to withdraw special antidiscrimination protections only from those of homosexual "orientation" who actually engage in homosexual conduct. * * * *

* * * * The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as Unamerican. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries old criminal laws that we held constitutional in *Bowers*. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are *homosexuals;* they can be favored for many reasons—for example, because they are senior

citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality*.

But though Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate filled "gay bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternate life style." The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, App. 254 (affidavit of Prof. James Hunter), and of course care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See, *e.g.*, Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 Neb. L. Rev. 723, 724 (1993) ("[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation").

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. * * * * I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. * * * *

[T]here is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah *to this day* contain provisions stating that polygamy is "forever prohibited." Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state legislated, or perhaps even local option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

The United States Congress, by the way, *required* the inclusion of these anti polygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah, as a condition of their admission to statehood. (For Arizona, New Mexico, and Utah, moreover, the Enabling Acts required that the anti polygamy provisions be "irrevocable without the consent of the United States and the people of said State"—so that not only were "each of [the] parts" of these States not "open on impartial terms" to polygamists, but even the States as a whole were not; polygamists would have to persuade the whole country to their way of thinking.) Idaho adopted the constitutional provision on its own, but the 51st Congress, which admitted Idaho into the Union, found its constitution to be "republican in form *and . . . in conformity with the Constitution of the United States* Thus, this "singling out" of the sexual practices of a single group for statewide, democratic vote—so utterly alien to our constitutional system, the Court would have us believe—has not only happened, but has received the explicit approval of the United States Congress.

I cannot say that this Court has explicitly approved any of these state constitutional provisions; but it has approved a territorial statutory provision that went even further, depriving polygamists of the ability even to achieve a constitutional amendment, by depriving them of the power to vote. In *Davis* v. *Beason* (1890) * * * * To the extent, if any, that this opinion permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has of course been overruled by later cases. * * * *

This Court cited *Beason* with approval as recently as 1993, in an opinion authored by the same Justice who writes for the Court today. * * * *

The Court today, announcing that Amendment 2 "defies . . . conventional [constitutional] inquiry," and "confounds [the] normal process of judicial review," employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values. The Court's stern disapproval of "animosity" towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in *Murphy* v. *Ramsey* (1885), rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

"[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than " 'a bare . . . desire to harm a politically unpopular group,' " quoting *Department of Agriculture* v. *Moreno* (1973), is nothing short of insulting. (It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.)

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools. This law school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, see, *e.g.*, Employment Non Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments of 1975, H. R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990, see 42 U.S.C. § 12211(a) (1988 ed., Supp. V).

* * *

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. I dissent.

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1.8: CHAPTER SIX- Fundamental Rights and Equal Protection

I. Education

San Antonio Independent School District v. Rodriguez
411 U.S. 1 (1973)

Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, Blackmun, and Rehnquist, JJ., joined. Stewart, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion. White, J., filed a dissenting opinion, in which Douglas and Brennan, JJ., joined. Marshall, J., filed a dissenting opinion, in which Douglas, J., joined.

Mr. Justice Powell delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. * * * * In December 1971 {three judge court} panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. For the reasons stated in this opinion, we reverse the decision of the District Court.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools. Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. * * * *

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State. Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities. * * * * Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program. Today, this Program accounts for approximately half of the total educational expenditures in Texas. The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. * * * *

In the years since this program went into operation in 1949, expenditures for education – from state as well as local sources – have increased steadily. * * * *

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is

situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960 – the lowest in the metropolitan area – and the median family income ($4,686) is also the lowest. At an equalized tax rate of $1.05 per $100 of assessed property – the highest in the metropolitan area – the district contributed $26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248. Federal funds added another $108 for a total of $356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds $49,000, and the median family income is $8,001. In 1967-1968 the local tax rate of $.85 per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that Program, the district was able to supply $558 per student. Supplemented by a $36 per-pupil grant from federal sources, Alamo Heights spent $594 per pupil.

* * * * Despite * * * * recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. Finding that wealth is a "suspect" classification and that education is a "fundamental" interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications."

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. * * * * {But} the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote. Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their

findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative – rather than absolute – nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In *Griffin v. Illinois* (1956), and its progeny the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion de facto discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some "adequate substitute" for a full stenographic transcript. * * * *

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system – discrimination against a class of definably "poor" persons – might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts." * * * * Defining "poor" families as those below the Bureau of the Census "poverty level," the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas – those same areas that provide the most attractive sources of property tax income for school districts. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people – defined by reference to any level of absolute impecunity – are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'" The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now

assures “every child in every school district an adequate education.” No proof was offered at trial persuasively discrediting or refuting the State’s assertion.

For these two reasons – the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education – the disadvantaged class is not susceptible of identification in traditional terms. * * * *

However described, it is clear that appellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State’s system impermissibly interferes with the exercise of a “fundamental” right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *Shapiro v. Thompson* (1969). It is this question – whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution – which has so consumed the attention of courts and commentators in recent years.

B

In *Brown v. Board of Education* (1954), a unanimous Court recognized that “education is perhaps the most important function of state and local governments.” What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided.

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that “the grave significance of education both to the individual and to our society” cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. {discussion of cases, including *Shapiro v. Thompson* omitted}.

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Eisenstadt v. Baird* (1972); *Skinner v. Oklahoma* (1942).

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation. It is appellees’ contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a

fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where – as is true in the present case – no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. * * * *

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner v. Oklahoma*; *Shapiro v. Thompson*. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. * * * * Every step leading to the establishment of the system Texas utilizes today – including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid – was implemented in an effort to extend public education and to improve its quality. Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.

C

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights. * * * *

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly upon the demands of the Equal Protection Clause. * * * *

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored – not without some success – to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.

IV

* * * * The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

Mr. Justice Marshall, with whom Mr. Justice Douglas concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education* (1954). I must therefore respectfully dissent.

* * * * {T}he appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough." The basis for such a novel view is far from clear. It is, of course, true that the Constitution

does not require precise equality in the treatment of all persons. * * * * But this Court has never suggested that, because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency, but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike."

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse constitutional discrimination. * * * *

I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See *Dandridge v. Williams* (1970) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find, in fact, that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge v. Williams* (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*. But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution."

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma* (1942) or the right to vote in state elections, *e.g., Reynolds v. Sims* (1964) or the right to an appeal from a criminal conviction, *e.g., Griffin v. Illinois* (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck v. Bell* (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma*, the Court, without impugning the continuing validity of *Buck v. Bell*, held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." Recently, in *Roe v. Wade* (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that, at the same time, the Court reaffirmed its initial decision in *Buck v. Bell*. * * * *

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests, or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws." Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of

the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental. * * * *

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Plyler v. Doe

457 U.S. 202 (1982)

Brennan, J., delivered the opinion of the Court, in which Marshall, Blackmun, Powell, and Stevens, JJ., joined. Marshall, J., Blackmun, J., and Powell, J., filed {separate} concurring opinions. Burger, C.J., filed a dissenting opinion, in which White, Rehnquist, and O'Connor, JJ., joined.

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

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, and those who have entered unlawfully are subject to deportation. But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country. Tex. Educ. Code Ann. § 21.031.

These cases involve constitutional challenges to those provisions.

This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District. The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief.

In considering this motion, the District Court made extensive findings of fact. The court found that neither § 21.031 nor the School District policy implementing it had "either the purpose or effect of keeping illegal aliens out of the State of Texas." Respecting defendants' further claim that § 21.031 was simply a financial measure designed to avoid a drain on the State's fisc, the court recognized that the increases in population resulting from the immigration of Mexican nationals into the United States had created

problems for the public schools of the State, and that these problems were exacerbated by the special educational needs of immigrant Mexican children. The court noted, however, that the increase in school enrollment was primarily attributable to the admission of children who were legal residents. It also found that while the "exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level funding from both the State and Federal Governments was based primarily on the number of children enrolled. In net effect then, barring undocumented children from the schools would save money, but it would "not necessarily" improve "the quality of education." The court further observed that the impact of § 21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated illegally and – for all practical purposes – permanently to the United States." Finally, the court noted that under current laws and practices "the illegal alien of today may well be the legal alien of tomorrow," and that without an education, these undocumented children, "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class."

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that § 21.031 violated that Clause. Suggesting that "the state's exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed," the court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis. * * * *

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction. * * * *With respect to equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court, concluding that § 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test." We noted probable jurisdiction. * * * *

II

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." (Emphasis added.) 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. *Yick Wo v. Hopkins* (1886). * * * *

* * * * To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection. * * * *

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a [substantial interest of the State. {foonote to *Craig v. Boren*}. We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

A

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." *Meyer v. Nebraska* (1923). 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. What we said 28 years ago in *Brown v. Board of Education* (1954), still holds true * * * *

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. See *San Antonio Independent School Dist. v. Rodriguez*. 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.

IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children vel non establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.

* * * * 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." We therefore turn to the state objectives that are said to support § 21.031.

V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents." Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate. Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status – an asserted prerogative that carries only minimal force in the circumstances of these cases – we discern three colorable state interests that might support § 21.031.

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," *Shapiro v. Thompson* (1969), 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. * * * * 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. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

VI

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. Accordingly, the judgment of the Court of Appeals in each of these cases is *Affirmed*.

Justice Blackmun, concurring.

I join the opinion and judgment of the Court. * * * * I write separately, however, because in my view the nature of the interest at stake is crucial to the proper resolution of these cases.

The "fundamental rights" aspect of the Court's equal protection analysis – the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized – has been the subject of some controversy. Justice Harlan, for example, warned that "[v]irtually every state statute affects important rights. . . . [T]o extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.'" *Shapiro v. Thompson* (1969) (dissenting opinion). Others have noted that strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for "a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications." *San Antonio Independent School Dist. v. Rodriguez* (1973) (Stewart, J., concurring). Still others have suggested that fundamental rights are not properly a part of equal protection analysis at all, because they are unrelated to any defined principle of equality.

These considerations, combined with doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies, led the Court in *Rodriguez* to articulate a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution." It therefore squarely rejected the notion that "an ad hoc determination as to the social or economic importance" of a given interest is relevant to the level of scrutiny accorded classifications involving that interest, and made clear that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

I joined Justice Powell's opinion for the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes. Classifications infringing substantive constitutional rights necessarily will be invalid, if not by force of the Equal Protection Clause, then through operation of other provisions of the Constitution. Conversely, classifications bearing on nonconstitutional interests – even those involving "the most basic economic needs of impoverished human beings," *Dandridge v. Williams* (1970) – generally are not subject to special treatment under the Equal Protection Clause, because they are not distinguishable in any relevant way from other regulations in "the area of economics and social welfare."

With all this said, however, I believe the Court's experience has demonstrated that the *Rodriguez* formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis. Thus, the Court's decisions long have accorded strict scrutiny to classifications bearing on the right to vote in state elections * * * * In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any

meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

It is arguable, of course, that the Court never should have applied fundamental rights doctrine in the fashion outlined above. * * * * But it is too late to debate that point, and I believe that accepting the principle of the voting cases – the idea that state classifications bearing on certain interests pose the risk of allocating rights in a fashion inherently contrary to any notion of "equality" – dictates the outcome here. * * * *

In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group – through the State's action – will have been converted into a discrete underclass. Other benefits provided by the State, such as housing and public assistance, are of course important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.

This conclusion is fully consistent with *Rodriguez*. The Court there reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children," noting that "no charge fairly could be made that the system [at issue in *Rodriguez*] fails to provide each child with an opportunity to acquire . . . basic minimal skills." And it cautioned that in a case "involv[ing] the most persistent and difficult questions of educational policy, . . . [the] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." Thus *Rodriguez* held, and the Court now reaffirms, that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." Similarly, it is undeniable that education is not a "fundamental right" in the sense that it is constitutionally guaranteed. Here, however, the State has undertaken to provide an education to most of the children residing within its borders. And, in contrast to the situation in *Rodriguez*, it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. In such circumstances, the voting decisions suggest that the State must offer something more than a rational basis for its classification. * * * *

Justice Marshall, concurring.

While I join the Court opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District v. Rodriguez* (dissenting opinion). I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." * * * *

Justice Powell, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the cases before us.

The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable. * * * * I agree with the Court that their children should not be left on the streets uneducated.

Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates. * * * *

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. * * * *

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes

1. Be prepared to discuss all of the challenges that the plaintiffs in *San Antonio Independent School District v. Rodriguez* would make.

2. A state constitutional law "sequel" to *San Antonio* is *Edgewood Independent Sch. Dist. v. Kirby* discussed in Chapter Twelve.

3. Be prepared to discuss the "door" that *San Antonio* leaves open that is apparent in *Plyler v. Doe*.

II. Voting

Reynolds v. Sims

377 U.S. 533 (1964)

Warren, C.J., delivered the opinion of the Court, joined by Black, Douglas, Brennan, White, and Goldberg, J.J. Clark, J. and Stewart, J., filed concurring opinions. Harlan, J., filed a dissenting opinion.

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

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under the Equal Protection Clause of the Federal Constitution, the existing and two legislatively proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures.

I

On August 26, 1961, the original plaintiffs (appellees in No. 23), residents, taxpayers and voters of Jefferson County, Alabama, filed a complaint in the United States District Court for the Middle District of Alabama, in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama Legislature. Defendants below (appellants in No. 23), sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections. The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment * * * *

{The Alabama legislature had both a House and a Senate, with 106 and 35 representatives respectively for the 67 counties. Because of population disparities, some Senate districts had large populations while other Senate districts had small populations, with a disparity of 41-1. The Legislature's failure to reapportion and its subsequent reapportion plans that maintained the disparity were challenged.}

II

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. The Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing. As the Court stated, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." Racially based gerrymandering and the conducting of white primaries, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

* * * * {A} fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.

III

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. * * * * While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like *Skinner v. Oklahoma* (1942), such a case "touches a sensitive and important area of human rights," and "involves one of the basic civil rights of man," presenting questions of alleged "invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." 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. Almost a century ago, in *Yick Wo v. Hopkins*, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights."

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could 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 simple-minded 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. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative

bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all 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, *Brown v. Board of Education*. * * * * Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally 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.

IV

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, under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. * * * *

* * * * Much has been written * * * * about the applicability of the so-called federal analogy to state legislative apportionment arrangements. After considering the matter, the court below concluded that no conceivable analogy could be drawn between the federal scheme and the apportionment of seats in the Alabama Legislature under the proposed constitutional amendment. We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. * * * *

The 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. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. * * * *

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. * * * *The relationship of the States to the Federal Government could hardly be less analogous.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a "republican form of government." We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. * * * * In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

* * * *

V–IX

{discussing specific plans and remedies; omitted}

X

We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well-considered exercise of judicial power * * * * we affirm the judgment below and remand the cases for further proceedings consistent with the views stated in this opinion.

It is so ordered.

Harper v. Virginia Board of Elections

383 U.S. 663 (1966)

Justice Douglas delivered the opinion of the Court. Justice Black, filed a dissenting opinion. Justice Harlan, filed a dissenting opinion, joined by Justice Stewart.

Justice Douglas delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax. The three-judge District Court, feeling bound by our decision in *Breedlove v. Suttles* (1937) dismissed the complaint. The cases came here on appeal and we noted probable jurisdiction.

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. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction

that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter v. Northampton Election Board* (1959). We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot."

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. Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot, we held in *Carrington v. Ras*h (1969), that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. "By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. * * * * We think the same must be true of requirements of wealth or affluence or payment of a fee.

Long ago in *Yick Wo v. Hopkins* (1886) the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds v. Sims*, we said, "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." There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded:

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 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. Levy "by the poll," as stated in *Breedlove v. Suttles* is an old familiar form of taxation; and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise. *Breedlove v. Suttles* sanctioned its use as "a prerequisite of voting." To that extent the *Breedlove* case is overruled.

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York* (1905)). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 – more than a half-century later – we repudiated the "separate-but-equal" doctrine of *Plessy* as respects public education we stated: "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." *Brown v. Board of Education* (1954).

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required. *Reynolds v. Sims*. We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds v. Sims*, is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

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.

Reversed.

Mr. Justice Black, dissenting.

In *Breedlove v. Suttles*, decided December 6, 1937, a few weeks after I took my seat as a member of this Court, we unanimously upheld the right of the State of Georgia to make payment of its state poll tax a prerequisite to voting in state elections. We rejected at that time contentions that the state law violated the Equal Protection Clause of the Fourteenth Amendment because it put an unequal burden on different groups of people according to their age, sex, and ability to pay.

Since {then} the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V of the Constitution. I would adhere to the holding of those cases. The Court, however, overrules *Breedlove* in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent.

It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the District Court below and with my Brothers Harlan and Stewart that this record would not support any finding that the Virginia poll tax law the Court invalidates has any such effect. If the record could support a finding that the law as written or applied has such an effect, the law would of course be unconstitutional as a violation of the Fourteenth and Fifteenth Amendments * * * *

The Court denies that it is using the "natural-law-due-process formula." It says that its invalidation of the Virginia law "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." I find no statement in the Court's opinion, however, which advances even a plausible argument as to why the alleged discriminations which might possibly be effected by Virginia's poll tax law are "irrational," "unreasonable," "arbitrary," or "invidious" or have no relevance to a legitimate policy which the State wishes to adopt. The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. The Court's failure to give any reasons to show that these purposes of the poll tax are "irrational," "unreasonable," "arbitrary," or "invidious" is a pretty clear indication to me that none exist. I can only conclude that the primary, controlling, predominant, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. * * * *

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States {footnote 1: Alabama, Mississippi, Texas, and Virginia} with respect to state elections, is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government. * * * *

Bush v. Gore

531 U.S. 98 (2000)

The per curiam opinion was joined by Rehnquist, C.J., O'Connor, Scalia, Kennedy, and Thomas, J.J. Rehnquist C.J., filed a concurring opinion in which Scalia and Thomas, J.J. joined. Stevens, J., filed a dissenting opinion in which Ginsburg and Breyer, J.J. joined. Souter, J., filed a dissenting opinion in which Breyer and Stevens, J.J. joined, and Ginsburg, J., joined except as to Part C. Ginsburg, J., filed a dissenting opinion joined by Stevens and Souter, J.J., and Breyer, J., as to Part I; Breyer filed a dissenting opinion, joined by Stevens, J., and Ginsburg, J., except as to part I-A-1, and by Souter, J., as to part I.

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 {Florida} 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. §§ 102.111, 102.112. 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 I*. 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 to § 102.168(3)(c), which 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 Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. *Gore v. Harris* (2000). The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The {Florida} Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). Noting the closeness of the election, the Court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.'" The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," the Supreme Court further held that the

Circuit Court could order "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 both 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. Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the Court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U. S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker* (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections* (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered 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." *Reynolds v. Sims* (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the

card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. ("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders* (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie* (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondent's submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this (noting "practical difficulties" may control outcome of election, but certifying partial Miami-Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Bush I*, at respondents' own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been addressed, although {Florida Supreme Court} Chief Justice Wells called attention to the concern in his dissenting opinion.

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U. S. C. § 5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. {In addition to 5 Justices in per curiam, add} (Souter, J., dissenting); (Breyer, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U. S. C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2000).

* * *

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

Justice Stevens, with whom Justice Ginsburg and Justice Breyer join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion. * * * *

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," is to be determined rises to the level of a constitutional violation. We found such a violation when individual votes within the same State were weighted unequally, *see, e.g., Reynolds v. Sims* (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson* (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees."

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris*, did the Florida Supreme Court make any substantive change in Florida electoral law. Its decisions were rooted in long-established precedent and were

consistent with the relevant statutory provisions, taken as a whole. It did what courts do—it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

Check Your Understanding

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Richardson v. Ramirez
418 U.S. 24 (1974)

Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, and Powell, JJ., joined. Douglas, J., filed a dissenting statement. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined and in Part I-A of which Douglas, J., joined.

Mr. Justice Rehnquist delivered the opinion of the Court.

The three individual respondents in this case were convicted of felonies and have completed the service of their respective sentences and paroles. They filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters. They claimed, on behalf of themselves and others similarly situated, that application to them of the provisions of the California Constitution and implementing statutes which disenfranchised persons convicted of an "infamous crime" denied them the right to equal protection of the laws under the Federal Constitution. The Supreme Court of California held that "as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification . . . violate the equal protection clause of the Fourteenth Amendment." We granted certiorari.

I

Before reaching respondents' constitutional challenge, the Supreme Court of California considered whether a decision reached by the three county clerks not to contest the action, together with their representation to the court that they would henceforth permit all ex-felons whose terms of incarceration and parole had expired to register and vote, rendered this case moot. That court decided that it did not. * * * *

As a practical matter, there can be no doubt that there is a spirited dispute between the parties in this Court as to the constitutionality of the California provisions disenfranchising ex-felons. * * * * The briefs of the parties before us indicate that the adverse alignment in the Supreme Court of California continues in this Court, and we therefore hold the case is not moot.

II

Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the Clause itself as it is embodied in the Fourteenth Amendment, respondents' claim implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar § 2 of the Amendment:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President

and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

(Emphasis supplied.)

Petitioner contends that the italicized language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. She goes on to argue that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of § 2, "except for participation in rebellion, or other crime," was intended to have a different meaning than would appear from its face.

The problem of interpreting the "intention" of a constitutional provision is, as countless cases of this Court recognize, a difficult one. Not only are there deliberations of congressional committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States. The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.

* * * *

Throughout the floor debates in both the House and the Senate, in which numerous changes of language in § 2 were proposed, the language "except for participation in rebellion, or other crime" was never altered. The language of § 2 attracted a good deal of interest during the debates, but most of the discussion was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom. What little comment there was on the phrase in question here supports a plain reading of it.

* * * *

The debates in the Senate did not cover the subject as exhaustively as did the debates in the House, apparently because many of the critical decisions were made by the Republican Senators in an unreported series of caucuses off the floor. * * * *

Nonetheless, the occasional comments of Senators on the language in question indicate an understanding similar to that of the House members.

* * * *

Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of § 2, by the fact that at the time of the adoption of the Amendment, 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.

More impressive than the mere existence of the state constitutional provisions disenfranchising felons at the time of the adoption of the Fourteenth Amendment is the congressional treatment of States readmitted to the Union following the Civil War. For every State thus readmitted, affirmative congressional action in the form of an enabling act was taken, and as a part of the readmission process the State seeking readmission was required to submit for the approval of the Congress its proposed state constitution. In March 1867, before any State was readmitted, Congress passed "An act to provide for the more efficient Government of the Rebel States," the so-called Reconstruction Act. Act of Mar. 2, 1867, c. 153, 14 Stat. 428. Section 5 of the Reconstruction Act established conditions on which the former Confederate States would be readmitted to representation in Congress. It provided:

That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disfranchised for participation in the rebellion or for felony at common*

law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State . . . .

(Emphasis supplied.)

* * * *

A series of enabling acts in 1868 and 1870 admitted those States to representation in Congress. The Act admitting Arkansas, the first State to be so admitted, attached a condition to its admission. Act of June 22, 1868, c. 69, 15 Stat. 72. That Act provided:

"WHEREAS the people of Arkansas, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and the act supplementary thereto, have framed and adopted a constitution of State government, which is republican, and the legislature of said State has duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen: Therefore,

"Be it enacted . . . That the State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State: Provided, That any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters."

The phrase "under laws equally applicable to all the inhabitants of said State" was introduced as an amendment to the House bill by Senator Drake of Missouri. Cong. Globe, 40th Cong., 2d Sess., 2600 (1868). Senator Drake's explanation of his reason for introducing his amendment is illuminating. He expressed concern that without that restriction, Arkansas might misuse the exception for felons to disenfranchise Negroes:

"There is still another objection to the condition as expressed in the bill, and that is in the exception as to the punishment for crime. The bill authorizes men to be deprived of the right to vote 'as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted.' There is one fundamental defect in that, and that is that there is no requirement that the laws under which men shall be duly convicted of these crimes shall be equally applicable to all the inhabitants of the State. It is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men."

The same "fundamental condition" as was imposed by the act readmitting Arkansas was also, with only slight variations in language, imposed by the Act readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, enacted three days later. Act of June 25, 1868, c. 70, 15 Stat. 73. That condition was again imposed by the Acts readmitting Virginia, Mississippi, Texas, and Georgia early in 1870. Act of Jan. 26, 1870, c. 10, 16 Stat. 62; Act of Feb. 1, 1870, c. 12, 16 Stat. 63; Act of Feb. 23, 1870, c. 19, 16 Stat. 67; Act of Mar. 30, 1870, c. 39, 16 Stat. 80; Act of July 15, 1870, c. 299, 16 Stat. 363.

This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons. Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. *Murphy v. Ramsey* (1885); *Davis v. Beason* (1890). Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northampton County Board of Elections* (1959), where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said:

Residence requirements, age, previous criminal record (*Davis v. Beason*) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.

Still more recently, we have summarily affirmed two decisions of three-judge District Courts rejecting constitutional challenges to state laws disenfranchising convicted felons. Both District Courts relied on *Green v. Board of Elections*, *cert. denied* (1968), where the Court of Appeals for the Second Circuit held that a challenge to New York's exclusion of convicted felons from the vote did not require the convening of a three-judge district court.

Despite this settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons, respondents argue that our recent decisions invalidating other state-imposed restrictions on the franchise as violative of the Equal Protection Clause require us to invalidate the disenfranchisement of felons as well. They rely on such cases to support the conclusions of the Supreme Court of California that a State must show a "compelling state interest" to justify exclusion of ex-felons from the franchise and that California has not done so here.

As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. We do not think that the Court's refusal to accept Mr. Justice Harlan's position in his dissents in *Reynolds v. Sims* (1964), and *Carrington v. Rash* (1965), that § 2 is the only part of the Amendment dealing with voting rights, dictates an opposite result. We need not go nearly so far as Mr. Justice Harlan would to reach our conclusion, for we may rest on the demonstrably sound proposition that § 1 in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement. Nor can we accept respondents' argument that because § 2 was made part of the Amendment "'largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment,'" we must not look to it for guidance in interpreting § 1. It is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.

Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles. The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment. This result is, in my view, based on an unsound historical analysis which already has been rejected by this Court. In straining to reach that result, I believe that the Court has also disregarded important limitations on its jurisdiction. For these reasons, I respectfully dissent.

I

{procedural discussion omitted}

II

Since the Court nevertheless reaches the merits of the constitutionality of California's disenfranchisement of ex-felons, I find it necessary to register my dissent on the merits as well. The Court construes § 2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons. Section 2 does except disenfranchisement for "participation in rebellion, or other crime" from the operation of its penalty provision. As the Court notes, however, there is little independent legislative history as to the crucial words "or other crime"; the proposed § 2 went to a joint committee containing only the phrase "participation in rebellion" and emerged with "or other crime" inexplicably tacked on. In its exhaustive review of the lengthy legislative history of the Fourteenth Amendment, the Court has come upon only one explanatory reference for the "other crimes" provision – a reference which is unilluminating at best.

The historical purpose for § 2 itself is, however, relatively clear and in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available – either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice – enfranchise Negro voters or lose congressional representation.

The political motivation behind § 2 was a limited one. It had little to do with the purposes of the rest of the Fourteenth Amendment. As one noted commentator explained:

"It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment." [I]t seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 was the sole source of national authority to protect voting rights, or that it expressly recognized the states' power to deny or abridge the right to vote."

It is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy – reduced representation – to cure a particular form of electoral abuse – the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination. This Court has repeatedly rejected that rationale. See *Reynolds v. Sims* (1964); *Carrington v. Rash* (1965).

Rather, a discrimination to which the penalty provision of § 2 is inapplicable must still be judged against the Equal Protection Clause of § 1 to determine whether judicial or congressional remedies should be invoked. That conclusion is compelled by this Court's holding in *Oregon v. Mitchell* (1970). Although § 2 excepts from its terms denial of the franchise not only to ex-felons but also to persons under 21 years of age, we held that the Congress, under § 5, had the power to implement the Equal Protection Clause by lowering the voting age to 18 in federal elections. * * * *

The Court's references to congressional enactments contemporaneous to the adoption of the Fourteenth Amendment, such as the Reconstruction Act and the readmission statutes, are inapposite. They do not explain the purpose for the adoption of § 2 of the Fourteenth Amendment. They merely indicate that disenfranchisement for participation in crime was not uncommon in the States at the time of the adoption of the Amendment. Hence, not surprisingly, that form of disenfranchisement was excepted from the application of the special penalty provision of § 2. But because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement. By providing a special remedy for disenfranchisement of a particular class of voters in § 2, Congress did not approve all election discriminations to which the § 2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny. Cf. *Shapiro v. Thompson* (1969). There is no basis for concluding that Congress intended by § 2 to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment. In fact, one form of disenfranchisement – one-year durational residence requirements – specifically authorized by the Reconstruction Act, one of the contemporaneous enactments upon which

the Court relies to show the intendment of the framers of the Fourteenth Amendment, has already been declared unconstitutional by this Court in *Dunn v. Blumstein* (1972).

Disenfranchisement for participation in crime, like durational residence requirements, was common at the time of the adoption of the Fourteenth Amendment. But "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." We have repeatedly observed:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Harper v. Virginia Board of Elections (1966).

Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of § 2, can serve to insulate such disenfranchisement from equal protection scrutiny.

III

In my view, the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of § 1 of the Fourteenth Amendment. That analysis properly begins with the observation that because the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," *Reynolds v. Sims*, voting is a "fundamental" right. * * * * "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" * * * *

I think it clear that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case. There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government. As the Secretary of State of California observed in his memorandum to the Court in support of respondents in this case:

"It is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens."

It is argued that disenfranchisement is necessary to prevent vote frauds. Although the State has a legitimate and, in fact, compelling interest in preventing election fraud, the challenged provision is not sustainable on that ground. First, the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population. In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters.

Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote. * * * * [T]he State "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." The California court's catalogue of that State's penal sanctions for election fraud surely demonstrates that there are adequate alternatives to disenfranchisement. * * * *

Given the panoply of criminal offenses available to deter and to punish electoral misconduct, as well as the statutory reforms and technological changes which have transformed the electoral process in the last century, election fraud may no longer be a serious danger.

Another asserted purpose is to keep former felons from voting because their likely voting pattern might be subversive of the interests of an orderly society. Support for the argument that electors can be kept from the ballot box for fear they might vote to repeal or emasculate provisions of the criminal code, is drawn primarily from this Court's decisions in *Murphy v. Ramsey* (1885),

and *Davis v. Beason* (1890). In *Murphy*, the Court upheld the disenfranchisement of anyone who had ever entered into a bigamous or polygamous marriage and in *Davis*, the Court sanctioned, as a condition to the exercise of franchise, the requirement of an oath that the elector did not "teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy." The Court's intent was clear – "to withdraw all political influence from those who are practically hostile to" the goals of certain criminal laws.

To the extent *Murphy* and *Davis* approve the doctrine that citizens can be barred from the ballot box because they would vote to change the existing criminal law, those decisions are surely of minimal continuing precedential value. We have since explicitly held that such "differences of opinion cannot justify excluding [any] group from . . . 'the franchise':

"[I]f they are . . . residents, . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing reexamination. This Court's holding in *Davis* and *Murphy* that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal "to prevent persons from being enabled by their votes to defeat the criminal laws of the country." Today, presumably those who support the legalization of marihuana could be barred from the ballot box for much the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect *Davis* and *Murphy*, I would expressly disavow any continued adherence to the dangerous notions therein expressed.

The public purposes asserted to be served by disenfranchisement have been found wanting in many quarters. When this suit was filed, 23 States allowed ex-felons full access to the ballot. Since that time, four more States have joined their ranks. Shortly after lower federal courts sustained New York's and Florida's disenfranchisement provisions, the legislatures repealed those laws. Congress has recently provided for the restoration of felons' voting rights at the end of sentence or parole in the District of Columbia. D.C. Code (1973). The National Conference on Uniform State Laws, the American Law Institute, the National Probation and Parole Association, the National Advisory Commission on Criminal Justice Standards and Goals, the President's Commission on Law Enforcement and the Administration of Justice, the California League of Women Voters, the National Democratic Party, and the Secretary of State of California have all strongly endorsed full suffrage rights for former felons.

The disenfranchisement of ex-felons had "its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government." *Byers v. Sun Savings Bank* (Oklahoma 1914). I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand.

I respectfully dissent.

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Notes

1. Chief Justice Earl Warren, writing for the Court in *Reynolds v. Sims* Court rejects the "federal analogy" relating to the United States Senate. Many political scientists view the United States Senate as being one of the "least representative representative bodies" in the world. The illustrative example compares Wyoming, the least populous state with fewer than 600,000 people in 2010, with California, the most populous state, having more than 37 million people in the 2010 census. Thus, in the United States Senate, a vote in Wyoming has more than 66 times the effect of a vote in California.

Note that Article V of the Constitution, regarding the process for Constitutional amendment, not only exempted amendments regarding slavery until 1808, but also provides "no state, without its consent, shall be deprived of its equal suffrage in the Senate."

2. *Bush v. Gore* raises more questions than it answers. One still-debated question is whether the United States Supreme Court selected the winner of the 2000 election. The per curiam opinion's final section seeks to dispel this view; is it convincing?

3. After *Richardson v. Ramirez*, what are the strategies, both constitutional and otherwise, that advocates for ending felony disenfranchisement might pursue?

III. Travel

Attorney Gen. of New York v. Soto-Lopez

476 U.S. 898 (1986)

Brennan, J., announced the judgment of the Court and delivered an opinion, in which Marshall, Blackmun, and Powell, JJ., joined. Burger, C.J and White, J., filed opinions concurring in the judgment. Stevens, J., filed a dissenting opinion. O'Connor, J., filed a dissenting opinion, in which Rehnquist and Stevens, JJ., joined.

Justice Brennan announced the judgment of the Court and delivered an opinion, in which Justice Marshall, Justice Blackmun, and Justice Powell join.

The question presented by this appeal is whether a preference in civil service employment opportunities offered by the State of New York solely to resident veterans who lived in the State at the time they entered military service violates the constitutional rights of resident veterans who lived outside the State when they entered military service.

I

The State of New York, through its Constitution, N. Y. Const., Art. V, 6, and its Civil Service Law, N. Y. Civ. Serv. Law 85 (McKinney 1983 and Supp. 1986), grants a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the United States Armed Forces, who served during time of war, and who were residents of New York when they entered military service. This preference may be exercised only once, either for original hiring or for one promotion. N. Y. Const., Art. V, § 6.

Appellees, Eduardo Soto-Lopez and Eliezer Baez-Hernandez, are veterans of the United States Army and long-time residents of New York. Both men claim to have met all the eligibility criteria for the New York State civil service preference except New York residence when they entered the Army. Both Soto-Lopez and Baez-Hernandez passed New York City civil service examinations, but were denied the veterans' preference by the New York City Civil Service Commission because they were residents of Puerto Rico at the time they joined the military. Appellees sued the city in Federal District Court, alleging that the requirement of residence when they joined the military violated the Equal Protection Clause of the Fourteenth Amendment and the constitutionally protected right to travel. The Attorney General of the State of New York intervened as a defendant.

The District Court dismissed appellees' complaint, holding that this Court's summary affirmance in *August v. Bronstein* (1974), a case in which a three-judge panel upheld against equal protection and right-to-travel challenges the same sections of the New York State Constitution and Civil Service Law at issue in the instant action, compelled that result. The Court of Appeals for the Second Circuit reversed. It concluded that *August* had implicitly been overruled by our more recent decision in *Zobel v. Williams* (1982), and held that the prior residence requirement of the New York civil service preference offends both the Equal Protection Clause and the right to travel. The Court of Appeals remanded with various instructions, including the direction that the District Court permanently enjoin the defendants from denying bonus points to otherwise qualified veterans who were not residents of New York at the time they entered the military service. We noted probable jurisdiction of this appeal of the Attorney General of New York. We affirm.

II

"'[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" *See, e. g., Passenger Cases* (1849) (Taney, C. J., dissenting); *Crandall v. Nevada* (1868); *Paul v. Virginia* (1869); *Edwards v. California* (1941); *Kent v. Dulles* (1958); *Shapiro v. Thompson* (1969); *Oregon v. Mitchell* (1970); *Memorial Hospital v. Maricopa County* (1974). And, it is clear that the freedom to travel includes the "freedom to enter and abide in any State in the Union."

The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, though, has proved elusive. It has been variously assigned to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause, and to the Privileges or Immunities Clause of the Fourteenth Amendment. The right has also been inferred from the federal structure of government adopted by our Constitution. However, in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision. Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.

A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses "'any classification which serves to penalize the exercise of that right.'" Our right-to-migrate cases have principally involved the latter, indirect manner of burdening the right. More particularly, our recent cases have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.

Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. *See, e. g., Cleburne v. Cleburne Living Center, Inc.* (1985); *Plyler v. Doe* (1982); *San Antonio Independent School District v. Rodriguez* (1973); *Shapiro v. Thompson* (1973). Thus, in several cases, we asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification. *See, e. g., Shapiro v. Thompson*. In other cases, where we concluded that the contested classifications did not survive even rational-basis scrutiny, we had no occasion to inquire whether enhanced scrutiny was appropriate. The analysis in all of these cases, however, is informed by the same guiding principle – the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.

New York's eligibility requirements for its civil service preference conditions a benefit on New York residence at a particular past time in an individual's life. It favors those veterans who were New York residents at a past fixed point over those who were not New York residents at the same point in their lives. Our cases have established that similar methods of favoring "prior" residents over "newer" ones, such as limiting a benefit to those who resided in the State by a fixed past date, granting incrementally greater benefits for each year of residence, and conditioning eligibility for certain benefits on completion of a fixed period of residence, warrant careful judicial review. But, our cases have also established that only where a State's law "'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration'" is heightened scrutiny triggered.

Our task in this case, then, is first to determine whether New York's restriction of its civil service preference to veterans who entered the Armed Forces while residing in New York operates to penalize those persons who have exercised their right to migrate. If we find that it does, appellees must prevail unless New York can demonstrate that its classification is necessary to accomplish a compelling state interest.

III

A

In previous cases, we have held that even temporary deprivations of very important benefits and rights can operate to penalize migration. For example, in *Shapiro {v. Thompson}* * * * * we found that recently arrived indigent residents were deprived of life's necessities by durational residence requirements for welfare assistance and for free, nonemergency medical care, respectively, which were available to other poor residents. * * * * The fact that these deprivations were temporary did not offset the Court's conclusions that they were so severe and worked such serious inequities among otherwise qualified residents that they effectively penalized new residents for the exercise of their rights to migrate.

More recently, in *Hooper v. Bernalillo* (1985), and *Zobel v. Williams* (1982), we struck down state laws that created permanent distinctions among residents based on the length or timing of their residence in the State. At issue in *Hooper* was a New Mexico statute that granted a tax exemption to Vietnam veterans who resided in the State before May 8, 1976. *Zobel* concerned an Alaska statute granting residents one state mineral income dividend unit for each year of residence subsequent to 1959. Because we employed rational-basis equal protection analysis in those cases, we did not face directly the question whether the contested laws operated to penalize interstate migration. Nonetheless, the conclusion that they did penalize migration may be inferred from our

determination that "the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'"

Soto-Lopez and Baez-Hernandez have been denied a significant benefit that is granted to all veterans similarly situated except for State of residence at the time of their entry into the military. While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial. The award of bonus points can mean the difference between winning or losing civil service employment, with its attendant job security, decent pay, and good benefits. Furthermore, appellees have been permanently deprived of the veterans' credits that they seek. As the Court of Appeals observed: "The veteran's ability to satisfy the New York residence requirement is . . . fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status." Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their rights to migrate.

B

New York offers four interests in justification of its fixed point residence requirement: (1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service. All four justifications fail to withstand heightened scrutiny on a common ground – each of the State's asserted interests could be promoted fully by granting bonus points to all otherwise qualified veterans. New York residents would still be encouraged to join the services. Veterans who served in time of war would be compensated. And, both former New Yorkers and prior residents of other States would be drawn to New York after serving the Nation, thus providing the State with an even larger pool of potentially valuable public servants.

* * * * Because New York could accomplish its purposes without penalizing the right to migrate by awarding special credits to all qualified veterans, the State is not free to promote its interests through a preference system that incorporates a prior residence requirement.

Two of New York's asserted interests have additional weaknesses. First, the availability of the preference to inductees as well as enlistees undercuts the State's contention that one of the most important purposes of the veterans' credit is to encourage residents to enlist in the services. Second, the fact that eligibility for bonus points is not limited to the period immediately following a veteran's return from war casts doubt on New York's asserted purpose of easing the transition from wartime military conditions to civilian life, for, presumably, a veteran of the Korean War could take a civil service examination and receive the bonus points tomorrow, 30 years after his homecoming. The State's failure to limit the credit to enlistees recently returned to New York from war strongly suggests that the State's principal interest is simply in rewarding its residents for service to their country.

Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments. *See, e. g., Personnel Administrator of Massachusetts v. Feeney* (1979). Nonetheless, this policy, even if deemed compelling, does not support a distinction between resident veterans based on their residence when they joined the military. Members of the Armed Forces serve the Nation as a whole. While a service person's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel. "Permissible discriminations between persons" must be correlated to "their relevant characteristics." *Zobel* (Brennan, J., concurring). Because prior residence has only a tenuous relation, if any, to the benefit New York receives from all Armed Forces personnel, the goal of rewarding military service offers no support for New York's fixed point residence requirement.

IV

In sum, the provisions of New York's Constitution, Art. V, § 6, and Civil Service Law 85, which limit the award of a civil service employment preference to resident veterans who lived in New York at the time they entered the Armed Forces, effectively penalize otherwise qualified resident veterans who do not meet the prior residence requirement for their exercise of the right to migrate. The State has not met its heavy burden of proving that it has selected a means of pursuing a compelling state interest which does not impinge unnecessarily on constitutionally protected interests. Consequently, we conclude that New York's veterans' preference violates appellees' constitutionally protected rights to migrate and to equal protection of the law.

Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." For as long as New York chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice O'Connor, with whom Justice Rehnquist and Justice Stevens join, dissenting.

The Court today holds unconstitutional the preference in public employment opportunities New York offers to resident wartime veterans who resided in New York when they entered military service. Because I believe that New York's veterans' preference scheme is not constitutionally offensive under the Equal Protection Clause, does not penalize some free-floating "right to migrate," and does not violate the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution, I dissent.

I

The plurality's constitutional analysis runs generally as follows: because the classification imposed by New York's limited, one-time veterans' civil service preference "penalizes" appellees' constitutional "right to migrate," the preference program must be subjected to heightened scrutiny, which it does not survive because it is insufficiently narrowly tailored to serve its asserted purposes. On the strength of this reasoning, the plurality concludes that the preference program violates both appellees' constitutional "right to migrate" and their right to equal protection of the law, although it does not make clear how much of its analysis is necessary or sufficient to find a violation of the "right to migrate" independently of an Equal Protection Clause violation.

In pursuing this new dual analysis, the plurality simply rejects the equal protection approach the Court has previously employed in similar cases, without bothering to explain why its novel use of both "right to migrate" analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent. Indeed, the plurality does not even feel "impelled to locate ['the right to migrate'] definitively in any particular constitutional provision," despite the fact that its ruling rests in major part on its determination that the preference scheme penalizes that right. The plurality's refusal to amplify its opinion further is even more remarkable given that the Court is overturning the very provisions of New York's Constitution and its Civil Service Law which it upheld against the same challenges just 12 years ago. See *August v. Bronstein*, summarily aff'd (1974).

The Chief Justice {concurring} finds it unnecessary to address the proper analytical role of the "right to travel" in this case because he believes that the New York scheme cannot survive rational basis scrutiny purely as a matter of equal protection law. Yet The Chief Justice's position depends in part on the assumption that New York's desire "to reward citizens for past contributions . . . is not a legitimate state purpose." This assumption is not required by anything in the Equal Protection Clause; rather, "a full reading of *Shapiro v. Thompson* (1969) * * * * reveals [that] the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration."

* * * * I also continue to believe that a State's desire to compensate its citizens for their prior contributions is "neither inherently invidious nor irrational," either under the Court's "right to migrate" or under some undefined, substantive component of the Equal Protection Clause. This case presents one of those instances in which the recognition of state citizens' past sacrifices constitutes a valid state interest that does not infringe any constitutionally protected interest * * * *

II

In my view, the New York veterans' preference scheme weathers constitutional scrutiny under any of the theories propounded by the Court. The plurality acknowledges that heightened scrutiny is appropriate only if the statutory classification "penalize[s]," "actually deters," or is primarily intended to "imped[e]" the exercise of the right to travel. * * * *

The New York law certainly does not directly restrict or burden appellees' freedom to move to New York and to establish residence there by imposing discriminatory fees, taxes, or other direct restraints. *Cf. The Passenger Cases* (1849). The New York preference program does not permanently deprive appellees of the right to participate in some fundamental or even "significant" activity, for "public employment is not a constitutional right . . . and the States have wide discretion in framing employee qualifications." *Personnel Administrator of Massachusetts v. Feeney* (1979). Nor does the program indirectly penalize migration by depriving the newcomers of fundamental rights or essential governmental services until they have resided in the State for a set period of time.

Finally, the New York scheme does not effectively penalize those who exercise their fundamental right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival. Those veterans who were not New York residents when they joined the United States Armed Forces, who subsequently move to New York, and who endeavor to secure civil service employment are treated exactly the same as the vast majority of New York citizens; they are in no sense regarded as "second-class citizens" when compared with the vast majority of New Yorkers or even the majority of the candidates against whom they must compete in obtaining civil employment. To the extent that persons such as appellees labor under any practical disability, it is a disability that they share in equal measure with countless other New York residents, including New York residents who joined the Armed Forces from New York but are ineligible for the veterans' preference for other reasons.

The only persons who arguably have an advantage based on their prior residency in New York in relation to persons in appellees' position are a discrete group of veterans who joined the Armed Forces while New York residents, who served during wartime, who returned to New York, and who elected to seek public employment. Even that group does not enjoy an unqualified advantage over appellees based on their prior residence. New York's veterans' preference scheme requires that veterans satisfy a number of preconditions, of which prior residency is only one, before they qualify for the preference. Moreover, the preference only increases the possibility of securing a civil service appointment; it does not guarantee it. Those newly arrived veterans who achieve a sufficiently high score on the exam may not be disadvantaged at all by the preference program; conversely, the chances of those who receive a very low score may not be affected by the fact that their competitors received bonus points. Finally, the bonus program is a one-time benefit. Veterans who join the service in New York, who satisfy the other statutory requirements, and who achieve a sufficiently high score on the exam to bring them within range of securing employment may only use the bonus points on one examination for appointment and in one job for promotion. Thus, persons such as appellees are not forced to labor under a "continuous disability" by comparison even to this discrete group of New York citizens.

Certainly the New York veterans' preference program imposes a less direct burden on a less "significant" interest than many resident-preference programs that this Court has upheld without difficulty. For example, this Court has summarily affirmed certain state residency requirements for state college tuition rates, *Sturgis v. Washington* (1973), and a limited eligibility statute in New York for scholarship assistance, *Spatt v. New York* (1973), even though those requirements constituted a potentially prohibitive burden on access to "important" educational opportunities, *San Antonio Independent School District v. Rodriguez* (1973). The Court has also upheld a 1-year durational residence requirement for eligibility to obtain a divorce in state courts, *Sosna v. Iowa*, even though the right to terminate a marriage has been deemed in some sense "fundamental." *See Boddie v. Connecticut* (1971).

In sum, finding that this scheme in theory or practical effect constitutes a "penalty" on appellees' fundamental right to settle in New York or on their "right to migrate" seems to me ephemeral, and completely unnecessary to safeguard the constitutional purpose of "maintaining a Union rather than a mere 'league of States.'" Thus, heightened scrutiny, either under the "right to migrate" or the Equal Protection Clause is inappropriate.

Under rational basis review, New York's program plainly passes constitutional muster. New York contends that its veterans' employment preference serves as an expression of gratitude to veterans who entered the service as New York residents. Even the plurality acknowledges the legitimacy of this state purpose. Indeed, it is difficult to impeach this interest, for "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages." * * * *

I have difficulty believing that the veterans' preference scheme employed by New York does not rationally relate to this legitimate state interest. I had certainly thought a State could award a medal to all New York veterans of designated wars, or that it could erect memorials in honor of certain residents returning from particular armed conflicts; it is hardly irrational to employ a means which gives certain returning wartime veterans a more tangible and useful expression of gratitude by way of employment preferences. I also find it hard to credit the idea that the Equal Protection Clause requires New York to reward the sacrifices of all those who joined the Armed Forces from other States and came to reside in New York if it wishes to reward the service of those who represented New York in the Armed Forces. Certainly those veterans who represented other States in the military aided New York by aiding the Nation, and suffered in equal measure with New York veterans, but that is not the issue. New York is not expressing gratitude for the prior resident's service to, and sacrifice for, the Nation as much as it is attempting to say "thank you" to those who personified New York's sacrifice and effort to "do its part" in supporting this Nation's war efforts. The prior residence of the individual seeking the statutory benefit clearly is a "relevant characteristic" to this legitimate and longstanding state interest and is one which has a manifest relation to the furtherance of that interest.

* * * * The modest scheme at issue here does not penalize in a constitutional sense veterans who joined the Armed Forces in other States for choosing to eventually settle in New York, and does not deny them equal protection. I would reverse the judgment of the Court of Appeals for the Second Circuit.

Check Your Understanding

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1.9: CHAPTER SEVEN- The Privileges Or Immunities Clause

Saenz v. Roe

526 U.S. 489 (1999)

Stevens, J., delivered the opinion of the court, in which O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Rehnquist, C. J., joined.

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. Because in 1992 a state program either had to conform to federal specifications or receive a waiver from the Secretary of Health and Human Services in order to qualify for federal reimbursement, § 11450.03 required approval by the Secretary to take effect. In October 1992, the Secretary issued a waiver purporting to grant such approval.

On December 21, 1992, three California residents who were eligible for AFDC benefits filed an action in the Eastern District of California challenging the constitutionality of the durational residency requirement in § 11450.03. Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances. One returned to California after living in Louisiana for seven years, the second had been living in Oklahoma for six weeks and the third came from Colorado. Each alleged that her monthly AFDC grant for the ensuing 12 months would be substantially lower under § 11450.03 than if the statute were not in effect. Thus, the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two.

The District Court issued a temporary restraining order and, after a hearing, preliminarily enjoined implementation of the statute. District Judge Levi found that the statute "produces substantial disparities in benefit levels and makes no accommodation for the different costs of living that exist in different states." Relying primarily on our decisions in *Shapiro v. Thompson* (1969), and *Zobel v. Williams* (1982), he concluded that the statute placed "a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." In his view, if the purpose of the measure was to deter migration by poor people into the State, it would be unconstitutional for that reason. And even if the purpose was only to conserve limited funds, the State had failed to explain why the entire burden of the saving should be imposed on new residents. The Court of Appeals summarily affirmed for the reasons stated by the District Judge.

We granted the State's petition for certiorari. We were, however, unable to reach the merits because the Secretary's approval of § 11450.03 had been invalidated in a separate proceeding, and the State had acknowledged that the Act would not be implemented without further action by the Secretary. We vacated the judgment and directed that the case be dismissed. *Anderson v. Green* (1995). Accordingly, § 11450.03 remained inoperative until after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 PRWORA, 110 Stat. 2105.

PRWORA replaced the AFDC program with TANF. The new statute expressly authorizes any State that receives a block grant under TANF to "apply to a family the rules (including benefit amounts) of the [TANF] program … of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." With this federal statutory provision in effect, California no longer needed specific approval from the Secretary to implement § 11450.03. The California Department of Social Services therefore issued an "All County Letter" announcing that the enforcement of § 11450.03 would commence on April 1, 1997.

The All County Letter clarifies certain aspects of the statute. Even if members of an eligible family had lived in California all of their lives, but left the State "on January 29th, intending to reside in another state, and returned on April 15th," their benefits are determined by the law of their State of residence from January 29 to April 15, assuming that that level was lower than California's. Moreover, the lower level of benefits applies regardless of whether the family was on welfare in the State of prior residence and regardless of the family's motive for moving to California. The instructions also explain that the residency requirement is inapplicable to families that recently arrived from another country.

II

On April 1, 1997, the two respondents filed this action in the Eastern District of California making essentially the same claims asserted by the plaintiffs in *Anderson v. Green*, but also challenging the constitutionality of PRWORA's approval of the durational residency requirement. As in *Green*, the District Court issued a temporary restraining order and certified the case as a class action. The Court also advised the Attorney General of the United States that the constitutionality of a federal statute had been drawn into question, but she did not seek to intervene or to file an *amicus* brief. Reasoning that PRWORA permitted, but did not require, States to impose durational residency requirements, Judge Levi concluded that the existence of the federal statute did not affect the legal analysis in his prior opinion in *Green*.

He did, however, make certain additional comments on the parties' factual contentions. He noted that the State did not challenge plaintiffs' evidence indicating that, although California benefit levels were the sixth highest in the Nation in absolute terms, when housing costs are factored in, they rank 18th; that new residents coming from 43 States would face higher costs of living in California; and that welfare benefit levels actually have little, if any, impact on the residential choices made by poor people. On the other hand, he noted that the availability of other programs such as homeless assistance and an additional food stamp allowance of $1 in stamps for every $3 in reduced welfare benefits partially offset the disparity between the benefits for new and old residents. Notwithstanding those ameliorating facts, the State did not disagree with plaintiffs' contention that § 11450.03 would create significant disparities between newcomers and welfare recipients who have resided in the State for over one year.

The State relied squarely on the undisputed fact that the statute would save some $10.9 million in annual welfare costs–an amount that is surely significant even though only a relatively small part of its annual expenditures of approximately $2.9 billion for the entire program. It contended that this cost saving was an appropriate exercise of budgetary authority as long as the residency requirement did not penalize the right to travel. The State reasoned that the payment of the same benefits that would have been received in the State of prior residency eliminated any potentially punitive aspects of the measure. Judge Levi concluded, however, that the relevant comparison was not between new residents of California and the residents of their former States, but rather between the new residents and longer term residents of California. He therefore again enjoined the implementation of the statute.

Without finally deciding the merits, the Court of Appeals affirmed his issuance of a preliminary injunction. It agreed with the District Court's view that the passage of PRWORA did not affect the constitutional analysis, that respondents had established a probability of success on the merits and that class members might suffer irreparable harm if § 11450.03 became operative. Although the decision of the Court of Appeals is consistent with the views of other federal courts that have addressed the issue, we granted certiorari because of the importance of the case. We now affirm.

III

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." (concurring opinion).

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.

In this case California argues that § 11450.03 was not enacted for the impermissible purpose of inhibiting migration by needy persons and that, unlike the legislation reviewed in *Shapiro*, it does not penalize the right to travel because new arrivals are not ineligible for benefits during their first year of residence. California submits that, instead of being subjected to the strictest scrutiny, the statute should be upheld if it is supported by a rational basis and that the State's legitimate interest in saving over $10 million a year satisfies that test. Although the United States did not elect to participate in the proceedings in the District Court or the Court of Appeals, it has participated as *amicus curiae* in this Court. It has advanced the novel argument that the enactment of PRWORA allows the States to adopt a "specialized choice-of-law-type provision" that "should be subject to an intermediate level of constitutional review," merely requiring that durational residency requirements be "substantially related to an important governmental objective." The debate about the appropriate standard of review, together with the potential relevance of the federal statute, persuades us that it will be useful to focus on the source of the constitutional right on which respondents rely.

IV

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."

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." *Paul v. Virginia* (1869). * * * * It provides important protections for nonresidents who enter a State whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing. 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." There may be a substantial reason for requiring the nonresident to pay more than the resident for a hunting license, or to enroll in the state university, but our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for "the 'citizen of State A who ventures into State B' to settle there and establish a home." Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

What is at issue in this case, then, is this 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* (1873), 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. The appropriate standard may be more categorical than that articulated in *Shapiro*, but it is surely no less strict.

V

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. * * * *

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. * * * *

These classifications may not be justified by a purpose to deter welfare applicants from migrating to California for three reasons. 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. Third, even if it were, as we squarely held in *Shapiro v. Thompson* (1969), such a purpose would be unequivocally impermissible.

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. Thus § 11450.03 is doubly vulnerable: 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. * * * *

VI

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. * * * *

* * *

Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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.

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. * * * * 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. * * * * {T}he traditional conception of the right to travel is simply not an issue in this case.

I also have no difficulty with aligning the right to travel with the protections afforded by the Privileges and Immunities Clause of Article IV, § 2, to nonresidents who enter other States "intending to return home at the end of [their] journey." Nonresident visitors of other States should not be subject to discrimination solely because they live out of State. Like the traditional right-to-travel guarantees discussed above, however, this Clause has no application here, because respondents expressed a desire to stay in California and become citizens of that State. * * * *

Finally, I agree with the proposition 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." *Slaughter-House Cases* (1873).

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. Indeed, the same dicta from the *Slaughter-House Cases* quoted by the Court actually treats the right to become a citizen and the right to travel as separate and distinct rights under the Privileges or Immunities Clause of the Fourteenth Amendment. At most, restrictions on an individual's right to become a citizen indirectly affect his calculus in deciding whether to exercise his right to travel in the first place, but such an attenuated and uncertain relationship is no ground for folding one right into the other. * * * *

The Court tries to distinguish education and divorce benefits by contending that the welfare payment here will be consumed in California, while a college education or a divorce produces benefits that are "portable" and can be enjoyed after individuals return to their original domicile. But this "you can't take it with you" distinction is more apparent than real, and offers little guidance to lower courts who must apply this rationale in the future. Welfare payments are a form of insurance, giving impoverished individuals and their families the means to meet the demands of daily life while they receive the necessary training, education, and time to look for a job. The cash itself will no doubt be spent in California, but the benefits from receiving this income and having the opportunity to become employed or employable will stick with the welfare recipient if they stay in California or go back to their true domicile. Similarly, tuition subsidies are "consumed" in-state but the recipient takes the benefits of a college education with

him wherever he goes. A welfare subsidy is thus as much an investment in human capital as is a tuition subsidy, and their attendant benefits are just as "portable." More importantly, this foray into social economics demonstrates that the line drawn by the Court borders on the metaphysical, and requires lower courts to plumb the policies animating certain benefits like welfare to define their "essence" and hence their "portability." As this Court wisely recognized almost 30 years ago, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams* (1970). * * * *

Check Your Understanding

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Notes

1. Be prepared to discuss the right to travel as **both** a privileges or immunities clause issue and equal protection clause issue under the Fourteenth Amendment.

2. Be prepared to discuss the issue of portable and non-portable benefits.

3. Does the Fourteenth Amendment's protection for the right to travel include rights for a person who relocates from Long Island City, Queens, New York (LIC) to Buffalo in Erie County, New York, about 400 miles? What about between LIC and Erie, Pennsylvania, about 436 miles? What about between LIC and Fort Lee, New Jersey, about 12 miles?

The Slaughter-House Cases

83 U.S. (16 Wall.) 36 (1873)

Mr. Justice Miller delivered the Opinion of the Court.

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

The cases * * * * were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions. * * * *

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

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

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

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

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

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for

each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

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

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

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. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go. * * * *

{The Court held that the Thirteenth Amendment did not apply}

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship-not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

‘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.’

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of

the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

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

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

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

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

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

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

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

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

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland* [1870], while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of

Judge Washington, those rights which the fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of *Paul v. Virginia* (1869), the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens.'

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

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

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

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

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

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

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

One of these is well described in the case of *Crandall v. Nevada* (1868). It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;' and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

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. * * * *

{Additionally} The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

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. * * * *

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

AFFIRMED.

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1.10: CHAPTER EIGHT- Incorporation and Fundamental Rights

McDonald v. City of Chicago

561 U.S. 742 (2010)

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and an opinion with respect to Parts II–C, IV, and V, in which Roberts, C. J., and Scalia and Kennedy, JJ., join. Scalia, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Ginsburg and Sotomayor, JJ., joined.

Justice Alito announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which The Chief Justice, Justice Scalia, Justice Kennedy, and Justice Thomas join, and an opinion with respect to Parts II–C, IV, and V, in which The Chief Justice, Justice Scalia, and Justice Kennedy join.

Two years ago, in *District of Columbia v. Heller* (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

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago's firearms laws. A City ordinance provides that "[n]o person shall … possess … any firearm unless such person is the holder of a valid registration certificate for such firearm." The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. Like Chicago, Oak Park makes it "unlawful for any person to possess … any firearm," a term that includes "pistols, revolvers, guns and small arms … commonly known as handguns." * * * *

After our decision in *Heller*, the Chicago petitioners and two groups filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge.

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. The court noted that the Seventh Circuit had "squarely upheld the constitutionality of a ban on handguns a quarter century ago," and that *Heller* had explicitly refrained from "opin[ing] on the subject of incorporation *vel non* of the Second Amendment." The court observed that a district judge has a "duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction."

The Seventh Circuit affirmed, relying on three 19th-century cases—*United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), and *Miller v. Texas* (1894)—that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases* (1873). The Seventh Circuit described the rationale of those cases as "defunct" and recognized that they did not consider the question whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms. Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have "direct application," and it declined to predict how the Second Amendment would fare under this Court's modern "selective incorporation" approach.

We granted certiorari.

II

A

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

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

B

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore* (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government.

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

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

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

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

to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions … [and to] become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.

Finding no constitutional protection against state intrusion of the kind envisioned by the Louisiana statute, the Court upheld the statute. Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." Justice Field opined that the Privileges or Immunities Clause protects rights that are "in their nature … fundamental," including the right of every man to pursue

his profession without the imposition of unequal or discriminatory restrictions. Justice Bradley's dissent observed that "we are not bound to resort to implication … to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] … what was meant for bread into a stone." (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. See, e.g., *Saenz v. Roe* (1999) (Thomas, J., dissenting) (scholars of the Fourteenth Amendment agree "that the Clause does not mean what the Court said it meant in 1873"); Brief for Constitutional Law Professors as *Amici Curiae* 33 (claiming an "overwhelming consensus among leading constitutional scholars" that the opinion is "egregiously wrong"). * * * *

C

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

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

D

1

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. *See Hurtado v. California* (1884) (due process does not require grand jury indictment); *Chicago, B. & Q. R. Co. v. Chicago* (1897) (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship.

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." While it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." The Court used different formulations in describing the boundaries of due process. For example, * * * * in *Snyder v. Massachusetts* (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko*, the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice."

Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." *Duncan v. Louisiana* (1968). Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law."

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. But others did not.

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. * * * *

2

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

3

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.

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

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

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

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

III

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," *Washington v. Glucksberg* (1997).

A

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. * * * *

B

{extensive historical discussions omitted} * * * * 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. * * * *

IV

Municipal respondents' remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in

effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. * * * *

V

{discussion of dissenting opinions omitted}

* * *

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

It is so ordered.

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

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

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," (citing *Duncan v. Louisiana* (1968)), and "'deeply rooted in this Nation's history and tradition,'" (quoting *Washington v. Glucksberg* (1997)). 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.

I

* * * * I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. *Planned Parenthood of Southeastern Pa.* v. *Casey* (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not "an inexorable command." *Lawrence v. Texas* (2003). 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.

II

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

III

My conclusion is contrary to this Court's precedents, which hold that the Second Amendment right to keep and bear arms is not a privilege of United States citizenship. I must, therefore, consider whether stare decisis requires retention of those precedents. As mentioned at the outset, my inquiry is limited to the right at issue here. Thus, I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated in the Constitution against the States. Nor do I suggest that the stare decisis considerations surrounding the application of the right to keep and bear arms against the States

would be the same as those surrounding another right protected by the Privileges or Immunities Clause. I consider *stare decisis* only as it applies to the question presented here.

A

This inquiry begins with the *Slaughter-House Cases*. * * * * I reject *Slaughter-House* insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship. I next proceed to the *stare decisis* considerations surrounding the precedent that expressly controls the question presented here.

B

Three years after *Slaughter-House*, the Court in *United States v. Cruikshank* (1876) squarely held that the right to keep and bear arms was not a privilege of American citizenship, thereby overturning the convictions of militia members responsible for the brutal Colfax Massacre. *Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences of *Cruikshank* warrant mention as well.

Cruikshank's holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.

Take, for example, the Hamburg Massacre of 1876. There, a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town. The white militia commander, "Pitchfork" Ben Tillman, later described this massacre with pride: "[T]he leading white men of Edgefield" had decided "to seize the first opportunity that the negroes might offer them to provoke a riot and teach the negroes a lesson by having the whites demonstrate their superiority by killing as many of them as was justifiable." S. Kantrowitz, Ben Tillman & the Reconstruction of White Supremacy 67 (2000) (ellipsis, brackets, and internal quotation marks omitted). None of the perpetrators of the Hamburg murders was ever brought to justice.

Organized terrorism like that perpetuated by Tillman and his cohorts proliferated in the absence of federal enforcement of constitutional rights. Militias such as the Ku Klux Klan, the Knights of the White Camellia, the White Brotherhood, the Pale Faces, and the '76 Association spread terror among blacks and white Republicans by breaking up Republican meetings, threatening political leaders, and whipping black militiamen. These groups raped, murdered, lynched, and robbed as a means of intimidating, and instilling pervasive fear in, those whom they despised. A. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 28–46 (1995).

Although Congress enacted legislation to suppress these activities, Klan tactics remained a constant presence in the lives of Southern blacks for decades. Between 1882 and 1968, there were at least 3,446 reported lynchings of blacks in the South. They were tortured and killed for a wide array of alleged crimes, without even the slightest hint of due process. Emmit Till, for example, was killed in 1955 for allegedly whistling at a white woman. The fates of other targets of mob violence were equally depraved.

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, " '[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.' " Sometimes, as in Cooper's case, self-defense did not succeed. He was dragged from his home by a mob and killed as his wife looked on. But at other times, the use of firearms allowed targets of mob violence to survive. One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. The experience left him with a sense, "not 'of powerlessness, but of the "possibilities of salvation" ' " that came from standing up to intimidation.

In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood —just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery. There is nothing about *Cruikshank*'s contrary holding that warrants its retention.

* * *

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. * * * *

{Petitioners'} 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."

* * * * *Heller* * * * * sheds no light on the meaning of the Due Process Clause of the Fourteenth Amendment. Our decisions construing that Clause to render various procedural guarantees in the Bill of Rights enforceable against the States likewise tell us little about the meaning of the word "liberty" in the Clause or about the scope of its protection of nonprocedural rights.

This is a substantive due process case.

I

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

Substantive Content

The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to "process." But substance and procedure are often deeply entwined. Upon closer inspection, the text can be read to "impos[e] nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law,'" *Washington* v. *Glucksberg* (1997) (Souter, J., concurring in judgment), lest superficially fair procedures be permitted to "destroy the enjoyment" of life, liberty, and property, *Poe* v. *Ullman* (1961) (Harlan, J., dissenting), and the Clause's prepositional modifier be permitted to swallow its primary command. Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations.

I have yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise. To the contrary, the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase "due process of law" had acquired substantive content as a term of art within the legal community. This understanding is consonant with the venerable "notion that governmental authority has implied limits which preserve private autonomy," a notion which predates the founding and which finds reinforcement in the Constitution's Ninth Amendment, see *Griswold* v. *Connecticut* (1965) (Goldberg, J., concurring). The Due Process Clause cannot claim to be the source of our basic freedoms—no legal document ever could—but it stands as one of their foundational guarantors in our law.

If text and history are inconclusive on this point, our precedent leaves no doubt: It has been "settled" for well over a century that the Due Process Clause "applies to matters of substantive law as well as to matters of procedure." Time and again, we have recognized that in the Fourteenth Amendment as well as the Fifth, the "Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Glucksberg*. "The Clause also includes a substantive

component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " Some of our most enduring precedents, accepted today by virtually everyone, were substantive due process decisions. See, *e.g.*, *Loving* v. *Virginia* (1967) (recognizing due-process- as well as equal-protection-based right to marry person of another race); *Bolling* v. *Sharpe* (1954) (outlawing racial segregation in District of Columbia public schools); *Pierce* v. *Society of Sisters* (1925) (vindicating right of parents to direct upbringing and education of their children); *Meyer* v. *Nebraska* (1923) (striking down prohibition on teaching of foreign languages).

Liberty

The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field. It is the liberty clause that enacts the Constitution's "promise" that a measure of dignity and self-rule will be afforded to all persons. *Planned Parenthood of Southeastern Pa.* v. *Casey* (1992). * * * * Our substantive due process cases have episodically invoked values such as privacy and equality as well, values that in certain contexts may intersect with or complement a subject's liberty interests in profound ways. But as I have observed on numerous occasions, "most of the significant [20th-century] cases raising Bill of Rights issues have, in the final analysis, actually interpreted the word 'liberty' in the Fourteenth Amendment."

It follows that the term "incorporation," like the term "unenumerated rights," is something of a misnomer. Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is "comprised within the term liberty." As the second Justice Harlan has shown, ever since the Court began considering the applicability of the Bill of Rights to the States, "the Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments." *Malloy* v. *Hogan* (1964) (dissenting opinion); see also Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965). In the pathmarking case of *Gitlow* v. *New York* (1925), for example, both the majority and dissent evaluated petitioner's free speech claim not under the First Amendment but as an aspect of "the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

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

Federal/State Divergence

The third precept to emerge from our case law flows from the second: The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights. As drafted, the Bill of Rights directly constrained only the Federal Government. Although the enactment of the Fourteenth Amendment profoundly altered our legal order, it "did not unstitch the basic federalist pattern woven into our constitutional fabric." Nor, for that matter, did it expressly alter the Bill of Rights. The Constitution still envisions a system of divided sovereignty, still "establishes a federal republic where local differences are to be cherished as elements of liberty" in the vast run of cases, Elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas.

It is true, as the Court emphasizes that we have made numerous provisions of the Bill of Rights fully applicable to the States. * * * *

It is true, as well, that during the 1960's the Court decided a number of cases involving procedural rights in which it treated the Due Process Clause as if it transplanted language from the Bill of Rights into the Fourteenth Amendment. * * * * In my judgment, this line of cases is best understood as having concluded that, to ensure a criminal trial satisfies essential standards of fairness, some procedures should be the same in state and federal courts: The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue. That principle has little relevance to the question whether a *non*procedural rule set forth in the Bill of Rights qualifies as an aspect of the liberty protected by the Fourteenth Amendment.

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

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

II

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

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." *Palko* v. *Connecticut* (1937). * * * * Implicit in Justice Cardozo's test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. * * * *

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. * * * * Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the "'traditions and conscience of our people,'" *Palko*, are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action. * * * *

Several of our most important recent decisions confirm the proposition that substantive due process analysis—from which, once again, "incorporation" analysis derives—must not be wholly backward looking. See, *e.g.*, *Lawrence* v. *Texas* (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry") * * * *

The Court's flight from *Palko* leaves its analysis, careful and scholarly though it is, much too narrow to provide a satisfying answer to this case. The Court hinges its entire decision on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms. Relying on *Duncan* and *Glucksberg*, the plurality suggests that only interests that have proved "fundamental from an American perspective," or " 'deeply rooted in this Nation's history and tradition,' " (quoting *Glucksberg*), to the Court's satisfaction, may qualify for incorporation into the Fourteenth Amendment. To the extent the Court's opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause, the opinion is seriously mistaken.

A rigid historical test is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms. * * * *

More fundamentally, a rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," *Glucksberg*, then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection. That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently " 'rooted' "; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it

effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.

No, the liberty safeguarded by the Fourteenth Amendment is not merely preservative in nature but rather is a "dynamic concept." * * * * The judge who would outsource the interpretation of "liberty" to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.

III

At this point a difficult question arises. In considering such a majestic term as "liberty" and applying it to present circumstances, how are we to do justice to its urgent call and its open texture—and to the grant of interpretive discretion the latter embodies—without injecting excessive subjectivity or unduly restricting the States' "broad latitude in experimenting with possible solutions to problems of vital local concern"? * * * *

The Framers did not express a clear understanding of the term to guide us, and the now-repudiated *Lochner* line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good. See, *e.g.*, *Lochner* v. *New York* (1905). * * * *

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

Relatedly, rather than evaluate liberty claims on an abstract plane, the Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*. And just as we have required such careful description from the litigants, we have required of ourselves that we "focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake." This does not mean that we must define the asserted right at the most specific level, thereby sapping it of a universal valence and a moral force it might otherwise have. It means, simply, that we must pay close attention to the precise liberty interest the litigants have asked us to vindicate.

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

IV

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. * * * *

In short, while the utility of firearms, and handguns in particular, to the defense of hearth and home is certainly relevant to an assessment of petitioners' asserted right, there is no freestanding self-defense claim in this case. The question we must decide is whether the interest in keeping in the home a firearm of one's choosing—a handgun, for petitioners—is one that is "comprised within the term liberty" in the Fourteenth Amendment.

V

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

First, firearms have a fundamentally ambivalent relationship to liberty. * * * * {I}n 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. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate. * * * *

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

Fourth, the Second Amendment differs in kind from the Amendments that surround it * * * * Notwithstanding the *Heller* Court's efforts to write the Second Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government. * * * *

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

Finally, even apart from the States' long history of firearms regulation and its location at the core of their police powers, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Whether or not we *can* assert a plausible constitutional basis for intervening, there are powerful reasons why we *should not* do so. * * * *

This is not a case, then, that involves a "special condition" that "may call for a correspondingly more searching judicial inquiry." *Carolene Products*, n. 4. Neither petitioners nor those most zealously committed to their views represent a group or a claim that is liable to receive unfair treatment at the hands of the majority. On the contrary, petitioners' views are supported by powerful participants in the legislative process. Petitioners have given us no reason to believe that the interest in keeping and bearing arms entails any special need for judicial lawmaking, or that federal judges are more qualified to craft appropriate rules than the people's elected representatives. Having failed to show why their asserted interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena, they have failed to show why "the word liberty in the Fourteenth Amendment" should be "held to prevent the natural outcome of a dominant opinion" about how to deal with the problem of handgun violence in the city of Chicago. *Lochner* (Holmes, J., dissenting).

VI

The preceding sections have already addressed many of the points made by Justice Scalia in his concurrence. But in light of that opinion's fixation on this one, it is appropriate to say a few words about Justice Scalia's broader claim: that his preferred method of

substantive due process analysis, a method "that makes the traditions of our people paramount," is both more restrained and more facilitative of democracy than the method I have outlined. Colorful as it is, Justice Scalia's critique does not have nearly as much force as does his rhetoric. His theory of substantive due process, moreover, comes with its own profound difficulties. * * * *

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

* * * * The malleability and elusiveness of history increase exponentially when we move from a pure question of original meaning, as in *Heller*, to Justice Scalia's theory of substantive due process. * * * * In conducting this rudderless, panoramic tour of American legal history, the judge has more than ample opportunity to "look over the heads of the crowd and pick out [his] friends," *Roper* v. *Simmons* (2005) (Scalia, J., dissenting). * * * *

VII

The fact that the right to keep and bear arms appears in the Constitution should not obscure the novelty of the Court's decision to enforce that right against the States. By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The Second Amendment was adopted to protect the *States* from federal encroachment. And the Fourteenth Amendment has never been understood by the Court to have "incorporated" the entire Bill of Rights. There was nothing foreordained about today's outcome.

Although the Court's decision in this case might be seen as a mere adjunct to its decision in *Heller*, the consequences could prove far more destructive—quite literally—to our Nation's communities and to our constitutional structure. Thankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for now, to the home. But neither the "assurances" provided by the plurality, nor the many historical sources cited in its opinion should obscure the reality that today's ruling marks a dramatic change in our law—or that the Justices who have joined it have brought to bear an awesome amount of discretion in resolving the legal question presented by this case.

I would proceed more cautiously. For the reasons set out at length above, I cannot accept either the methodology the Court employs or the conclusions it draws. Although impressively argued, the majority's decision to overturn more than a century of Supreme Court precedent and to unsettle a much longer tradition of state practice is not, in my judgment, built "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." *Griswold* (Harlan, J., concurring in judgment).

Accordingly, I respectfully dissent.

Check Your Understanding

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Notes

1. The *McDonald v. City of Chicago* opinions are in excess of 200 pages. Our excerpts are highly edited. We will return to some of the issues in *McDonald*, including the Second Amendment in the next chapter, and the issue of "unenumerated" rights under the Due Process Clause (highlighted in Justice Stevens' dissent) in following chapters.

2. Be prepared to articulate the methods of "incorporation" of a listed ("enumerated") right in the Bill of Rights against state governments.

3. Footnotes 12 and 13 in Alito's plurality opinion provide a useful catalogue and citations regarding the provisions of the Bill of Rights that have been incorporated including case citations.

Footnote 12 supports the proposition that "The Court eventually incorporated almost all of the provisions of the Bill of Rights" and reads:

With respect to the First Amendment, see *Everson* v. *Board of Ed. of Ewing* (1947) (Establishment Clause); *Cantwell* v. *Connecticut* (1940) (Free Exercise Clause); *De Jonge* v. *Oregon* (1937) (freedom of assembly); *Gitlow* v. *New York* (1925) (free

speech); *Near* v. *Minnesota ex rel. Olson* (1931) (freedom of the press).

With respect to the Fourth Amendment, see *Aguilar* v. *Texas* (1964) (warrant requirement); *Mapp* v. *Ohio* (1961) (exclusionary rule); *Wolf* v. *Colorado* (1949) (freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, see *Benton* v. *Maryland* (1969) (Double Jeopardy Clause); *Malloy* v. *Hogan* (1964) (privilege against self-incrimination); *Chicago, B. & Q. R. Co.* v. *Chicago* (1897) (Just Compensation Clause).

With respect to the Sixth Amendment, see *Duncan* v. *Louisiana* (1968) (trial by jury in criminal cases); *Washington* v. *Texas* (1967) (compulsory process); *Klopfer* v. *North Carolina* (1967) (speedy trial); *Pointer* v. *Texas* (1965) (right to confront adverse witness); *Gideon* v. *Wainwright* (1963) (assistance of counsel); *In re Oliver* (1948) (right to a public trial).

With respect to the Eighth Amendment, see *Robinson* v. *California* (1962) (cruel and unusual punishment); *Schilb* v. *Kuebel* (1971) (prohibition against excessive bail).

Footnote 13 discusses the "handful" of "Bill of Rights protections" that remain unincorporated and reads:

In addition to the right to keep and bear arms {before *McDonald*} (and the Sixth Amendment right to a unanimous jury verdict {*Apodaca* v. *Oregon* (1972) discussed further in fn 14}), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.

We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, (1989) (declining to decide whether the excessive-fines protection applies to the States). Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.

4. In *McDonald v. Chicago*, the Court stated that it has "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" In its footnote to this statement (footnote 14) the Court added:

There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. See *Apodaca v. Oregon*, 406 U. S. 404 (1972); see also *Johnson v. Louisiana*, 406 U. S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. *See Johnson*, *supra*, at 395 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U. S., at 406 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, id., at 414–415 (Stewart, J., dissenting); *Johnson*, *supra*, at 381–382 (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. See *Johnson*, *supra*, at 395–396 (Brennan, J., dissenting) (footnote omitted) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments").

We will return to this issue.

Timbs v. Indiana

586 U.S. ___ (2019)

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh, JJ., joined. Gorsuch, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in the judgment.

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 Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari.

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." *McDonald v. Chicago* (2010). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan v. Mayor of Baltimore* (1833). "The constitutional Amendments adopted in the aftermath of the Civil War," however, "fundamentally altered our country's federal system." *McDonald.* With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.* [citing notes 12–13]. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.

B

* * * * Directly at issue here is the phrase "nor excessive fines imposed," which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" The Fourteenth Amendment, we hold, incorporates this protection.

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 . . . ." § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225). 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." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment * * * *

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.

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.

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. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. * * * *

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." *McDonald*.

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.

* * * * In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham v. North Carolina* (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain common-place social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. *See also, e.g.*, Riley v. California (2014) (holding, without separately considering incorporation, that States' warrantless search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil in rem forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Justice Gorsuch, concurring

* * * * As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. * * * * But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Justice Thomas, concurring in the judgment

{omitted; Thomas concludes that the Eighth Amendment's Excessive Fines Clause is a privilege of American citizenship that applies to States pursuant to the Fourteenth Amendment's Privileges or Immunities Clause}

Check Your Understanding

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Ramos v. Louisiana

590 U.S. ____ (2020)

Gorsuch, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which Ginsburg, Breyer, Sotomayor, and Kavanaugh, JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which Ginsburg, Breyer, and Sotomayor, JJ., joined, and an opinion with respect to Part IV–A, in which Ginsburg and Breyer, JJ., joined. Sotomayor, J., filed an opinion concurring as to all but Part IV–A. Kavanaugh, J., filed an opinion concurring in part. Thomas, J., filed an opinion concurring in the judgment. Alito, J., filed a dissenting opinion, in which Roberts, C. J., joined, and in which Kagan, J., joined as to all but Part III–D.

Gorsuch, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which Ginsburg, Breyer, Sotomayor, and Kavanaugh, JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which Ginsburg, Breyer, and Sotomayor, JJ., joined, and an opinion with respect to Part IV–A, in which Ginsburg and Breyer, JJ., joined.

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror's vote to ac- quit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.

Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U. S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."

Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries." In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. Louisiana insists that this Court has never definitively passed on the question and urges us to find its practice consistent with the Sixth Amendment. By contrast, the dissent doesn't try to defend Louisiana's law on Sixth or Fourteenth Amendment grounds; tacitly, it seems to admit that the Constitution forbids States from using nonunanimous juries. Yet, unprompted by Louisiana, the dissent suggests our precedent requires us to rule for the State anyway. What explains all this? To answer the puzzle, it's necessary to say a bit more about the merits of the question presented, the relevant precedent, and, at last, the consequences that follow from saying what we know to be true.

I

The Sixth Amendment promises that "[i]n 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." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*— otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged

by statute. Imagine a constitution that allowed a "jury trial" to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district "previously ascertained by law." And if that's not enough, imagine a constitution that included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III. No: The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th- century England and was soon accepted as a vital right protected by the common law. * * * *

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years. * * * *

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. * * * *

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

A

How, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for so long? It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States' unconventional schemes for the first time—in *Apodaca* v. *Oregon* and a companion case, *Johnson* v. *Louisiana*. Ultimately, the Court could do no more than issue a badly fractured set of opinions. * * * *

Justice Powell frankly explained, he was "unwillin[g]" to follow the Court's precedents. So he offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent.

B

In the years following *Apodaca*, both Louisiana and Oregon chose to continue allowing nonunanimous verdicts. * * * *

III

Louisiana's approach may not be quite as tough as trying to defend Justice Powell's dual-track theory of incorporation, but it's pretty close. How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity? Or the fact that five Justices in *Apodaca* said the same? The best the State can offer is to suggest that all these statements came in dicta. * * * *

A

If Louisiana's path to an affirmance is a difficult one, the dissent's is trickier still. The dissent doesn't dispute that the Sixth Amendment protects the right to a unanimous jury verdict, or that the Fourteenth Amendment extends this right to state-court trials. But, it insists, we must affirm Mr. Ramos's conviction anyway. Why? Because the doctrine of *stare decisis* supposedly commands it. There are two independent reasons why that answer falls short.

In the first place and as we've seen, not even Louisiana tries to suggest that *Apodaca* supplies a governing precedent. * * * *

1

There's another obstacle the dissent must overcome. Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." * * * *

2

{discussion of reliance omitted}

V

On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one be- fore us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is

Reversed.

Justice Sotomayor, concurring as to all but Part IV–A.

I agree with most of the Court's rationale, and so I join all but Part IV–A of its opinion. I write separately, however, to underscore three points. First, overruling precedent here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the Louisiana and Oregon laws uniquely matter here. * * * *

Justice Kavanaugh, concurring in part.

* * * * I agree with the Court that the time has come to overrule *Apodaca*. I therefore join the introduction and Parts I, II–A, III, and IV–B–1 of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

* * * * As the Court has exercised the "judicial Power" over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III "judicial Power" with respect to precedent. The Federalist No. 37.

The *stare decisis* factors identified by the Court in its past cases include:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

But the Court has articulated and applied those various in- dividual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a "special justification" or "strong

grounds" to overrule a prior constitutional decision.

First, is the prior decision not just wrong, but grievously or egregiously wrong? * * * *

Second, has the prior decision caused significant negative jurisprudential or real-world consequences? * * * *

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors. * * * *

Justice Thomas, concurring in the judgment.

I agree with the Court that petitioner Evangelisto Ramos' felony conviction by a nonunanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of "trial . . . by an impartial jury." I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause. * * * *

Justice Alito, with whom The Chief Justice joins, and with whom Justice Kagan joins as to all but Part III–D, dissenting.

The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn.

Nearly a half century ago in *Apodaca* v. *Oregon* (1972), the Court held that the Sixth Amendment permits non-unanimous verdicts in state criminal trials, and in all the years since then, no Justice has even hinted that *Apodaca* should be reconsidered. Understandably thinking that *Apodaca* was good law, the state courts in Louisiana and Oregon have tried thousands of cases under rules that permit such verdicts. But today, the Court does away with *Apodaca* and, in so doing, imposes a potentially crushing burden on the courts and criminal justice systems of those States. The Court, however, brushes aside these consequences and even suggests that the States should have known better than to count on our decision.

To add insult to injury, the Court tars Louisiana and Oregon with the charge of racism for permitting non-unanimous verdicts—even though this Court found such verdicts to be constitutional and even though there are entirely legitimate arguments for allowing them.

I would not overrule *Apodaca*. Whatever one may think about the correctness of the decision, it has elicited enormous and entirely reasonable reliance. And before this Court decided to intervene, the decision appeared to have little practical importance going forward. Louisiana has now abolished non-unanimous verdicts, and Oregon seemed on the verge of doing the same until the Court intervened.

In Part II of this opinion, I will address the surprising argument, advanced by three Justices in the majority, that *Apodaca* was never a precedent at all, and in Part III, I will explain why *stare decisis* supports retention of that precedent. But before reaching those issues, I must say something about the rhetoric with which the majority has seen fit to begin its opinion.

I

Too much public discourse today is sullied by *ad hominem* rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents. The majority regrettably succumbs to this trend. At the start of its opinion, the majority asks this rhetorical question: "Why do Louisiana and Oregon allow nonunanimous convictions?" And the answer it suggests? Racism, white supremacy, the Ku Klux Klan. Non-unanimous verdicts, the Court implies, are of a piece with Jim Crow laws, the poll tax, and other devices once used to disfranchise African- Americans.

If Louisiana and Oregon originally adopted their laws allowing non-unanimous verdicts for these reasons, that is deplorable, but what does that have to do with the broad constitutional question before us? The answer is: nothing.

For one thing, whatever the reasons why Louisiana and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years. * * * *

{omitted}

A

Stare decisis has been a fundamental part of our jurisprudence since the founding, and it is an important doctrine. But, as we have said many times, it is not an "inexorable command." There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision.

This is imperative because the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine should not be transformed into a tool that favors particular outcomes.

B

What is the majority's justification for overruling *Apodaca*? With no apparent appreciation of the irony, today's majority, which is divided into four separate camps, criticizes the *Apodaca* majority as "badly fractured." * * * *

C

Up to this point, I have discussed the majority's reasons for overruling *Apodaca*, but that is only half the picture. What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon. For 48 years, Louisiana and Oregon, trusting that *Apodaca* is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury- unanimity issue. * * * *

D

The reliance in this case far outstrips that asserted in recent cases in which past precedents were overruled. * * * * {omitted discussion of recent cases overruling precedent}.

Check Your Understanding

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Further Your Understanding

CALI Lesson: Incorporation of Constitutional Rights

CALI, The Center for Assisted Legal Instruction, has a lesson designed to further your understanding of the constitutional doctrine and theories of incorporation regarding whether the federal government, the state government, or both are bound by the specific individual constitutional rights in the Bill of Rights.

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1.11: CHAPTER NINE- The Second Amendment

The Second Amendment reads in full:

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.

District of Columbia v. Heller
554 U.S. 570 (2008)

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

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." The District Court dismissed respondent's complaint. The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense reversed. It held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. The Court of Appeals directed the District Court to enter summary judgment for respondent.

We granted certiorari.

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." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. 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." See J. Tiffany, A

Treatise on Government and Constitutional Law (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' Brief). 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." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. "'It is nothing unusual in acts … for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.' " J. Bishop,Commentaries on Written Laws and Their Interpretation § 51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K. B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

1. Operative Clause.

a. "Right of the People."

The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.

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." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). 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." 1 A New and Complete Law Dictionary (1771); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

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. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows

and arrows on Sundays, &c. and not bear other arms."

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union* (1997) {internet}, and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States* (2001) {thermal imaging device}, 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. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone). Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen and everyone else.

At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. * * * *

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. * * * *

Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context—the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it except in discussions about the standing army and the militia. And the phrases used primarily in those military discussions include not only "bear arms" but also "carry arms," "possess arms," and "have arms"—though no one thinks that those other phrases also had special military meanings. The common references to those "fit to bear arms" in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. * * * *

Justice Stevens {dissenting} 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. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense … must sometimes have been almost overwhelming." * * * *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.") Justice Stevens believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). There is nothing to this. State constitutions of the founding

period routinely grouped multiple (related) guarantees under a singular "right," and the First Amendment protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances."* * * *

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." As we said in *United States v. Cruikshank* (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed …."

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. * * * *

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. * * * *

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State …."

a. "Well-Regulated Militia."

In *United States v. Miller* (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources.

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. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

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. * * * * It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a

free state" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "'free country' " or free polity. Moreover, the other instances of "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

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. The Federalist No. 29 (A. Hamilton). 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.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. * * * * It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

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. Justice Breyer's assertion {in his dissenting opinion} that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself. * * * *

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. * * * *

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 pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record. * * * *

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. * * * *

1. Post-ratification Commentary

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. * * * *

2. Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. * * * *

3. Post-Civil War Legislation

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. * * * *

4. Post-Civil War Commentators

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. * * * *

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment. * * * * {Extensive discussion of *United States* v. *Cruikshank* (1876); *Presser* v. *Illinois* (1886); *United States* v. *Miller* (1939) omitted.}

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, and it was not until after World War II that we held a law invalid under the Establishment Clause (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. It is demonstrably not true that, as Justice Stevens claims, "for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in

the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. 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.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. * * * *

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions {in the DC Code}. * * * *

Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." The Court of Appeals did not invalidate the licensing requirement, but held only that the District "may not prevent [a handgun] from being moved throughout one's house." * * * * Respondent conceded at oral argument that he does not "have a problem with … licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74–75. We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

* * * * Nothing about those fire-safety laws {discussed in Breyer's dissent} undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

Justice Breyer points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia and New York. Those laws provide no support for the severe restriction in the present case. * * * *

A broader point about the laws that Justice Breyer cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.

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. See *National Socialist Party of America v. Skokie* (1977) (per curiam). 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, any more than *Reynolds v. United States* (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. 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.

We affirm the judgment of the Court of Appeals.

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.

* * * *

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.

* * * *

Check Your Understanding

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Caetano v. Massachusetts

577 U.S. ___ (2016)

Per Curiam

The Court has held that "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," *District of Columbia* v. *Heller* (2008), and that this "Second Amendment right is fully applicable to the States," *McDonald* v. *Chicago* (2010). In this case, the Supreme Judicial Court of Massachusetts upheld a Massachusetts law prohibiting the possession of stun guns after examining "whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment."

The court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." This is inconsistent with *Heller*'s clear statement that the Second Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding."

The court next asked whether stun guns are "dangerous per se at common law and unusual," in an attempt to apply one "important limitation on the right to keep and carry arms," (referring to "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" {in *Heller*}). In so doing, the court concluded that stun guns are "unusual" because they are "a thoroughly modern invention." By equating "unusual" with "in common use at the time of the Second Amendment's enactment," the court's second explanation is the same as the first; it is inconsistent with *Heller* for the same reason.

Finally, the court used "a contemporary lens" and found "nothing in the record to suggest that [stun guns] are readily adaptable to use in the military." But *Heller* rejected the proposition "that only those weapons useful in warfare are protected."

For these three reasons, the explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent. Consequently, the petition for a writ of certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Alito, with whom Justice Thomas joins, concurring in the judgment {omitted}

{includes a discussion of the domestic violence context of the case in which Caetano purchased a stun gun to protect herself from her abusive ex-boyfriend}.

Check Your Understanding

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New York State Rifle and Pistol Ass'n v. Cuomo

and The Connecticut Citizens' Defense League v. Malloy

804 F.3d 242 **(2nd Cir. 2015)**

cert denied, sub nom Shew v. Malloy, __ U.S. __ (2016).

Before Judges Cabranes, Lohier, and Droney

José A. Cabranes, Circuit Judge {for the unanimous Second Circuit panel}:

Before the Court are two appeals challenging gun-control legislation enacted by the New York and Connecticut legislatures in the wake of the 2012 mass murders at Sandy Hook Elementary School in Newtown, Connecticut. The New York and Connecticut laws at issue prohibit the possession of certain semiautomatic "assault weapons" and large-capacity magazines. Following the entry of summary judgment in favor of defendants on the central claims in both the Western District of New York (William M. Skretny, *Chief Judge*) and the District of Connecticut (Alfred V. Covello, *Judge*), plaintiffs in both suits now press two arguments on appeal. First, they challenge the constitutionality of the statutes under the Second Amendment; and second, they challenge certain provisions of the statutes as unconstitutionally vague. {Most subsequent references to vagueness are omitted}. Defendants in the New York action also cross-appeal the District Court's invalidation of New York's separate seven-round load limit and voiding of two statutory provisions as facially unconstitutionally vague.

We hold that the core provisions of the New York and Connecticut laws prohibiting possession of semiautomatic assault weapons and large-capacity magazines do not violate the Second Amendment, and that the challenged individual provisions are not void for vagueness. The particular provision of New York's law regulating load limits, however, does not survive the requisite scrutiny. One further specific provision—Connecticut's prohibition on the non-semiautomatic Remington 7615—unconstitutionally infringes upon the Second Amendment right. Accordingly, we AFFIRM in part the judgment of the District Court for the District of Connecticut insofar as it upheld the prohibition of semiautomatic assault weapons and large-capacity magazines, and REVERSE in part its holding with respect to the Remington. With respect to the judgment of the District Court for the Western District of New York, we REVERSE in part certain vagueness holdings, and we otherwise AFFIRM that judgment insofar as it upheld the prohibition of semiautomatic assault weapons and large-capacity magazines and invalidated the load limit.

BACKGROUND

I. Prior "Assault Weapon" Legislation

New York and Connecticut have long restricted possession of certain automatic and semiautomatic firearms that came to be known as "assault weapons." In 1993, Connecticut's General Assembly adopted the state's first assault-weapon ban, which criminalized the possession of firearms "capable of fully automatic, semiautomatic or burst fire at the option of the user," including 67 specifically enumerated semiautomatic firearms.

The following year, after five years of hearings on the harms thought to be caused by certain firearms, the U.S. Congress enacted legislation restricting the manufacture, transfer, and possession of certain "semiautomatic 1 assault weapons." The 1994 federal statute defined "semiautomatic assault weapons" in two ways. First, it catalogued 18 specifically prohibited firearms, including, as relevant here, the Colt AR–15. Second, it introduced a "two-feature test," which prohibited any semiautomatic firearm that

contained at least two listed military-style features, including a telescoping stock, a conspicuously protruding pistol grip, a bayonet mount, a flash suppressor, and a grenade launcher. The federal statute also prohibited magazines with a capacity of more than ten rounds of ammunition, or which could be "readily restored or converted to accept" more than 10 rounds. The federal assault-weapons ban expired in 2004, pursuant to its sunset provision.

Following the passage of the federal assault-weapons ban, both New York, in 2000, and Connecticut, in 2001, enacted legislation that closely mirrored the federal statute, including the two-feature test for prohibited semiautomatic firearms. Unlike the federal statute, however, these state laws contained no sunset provisions and thus remained in force until amended by the statutes at issue here.

On December 14, 2012, a gunman shot his way into Sandy Hook Elementary School in Newtown, Connecticut and murdered twenty first-graders and six adults using a semiautomatic AR–15–type rifle with ten large-capacity magazines. This appalling attack, in addition to other recent mass shootings, provided the immediate impetus for the legislation at issue in this appeal.

II. The New York Legislation

New York enacted the Secure Ammunition and Firearms Enforcement Act (SAFE Act) on January 15, 2013. The SAFE Act expands the definition of prohibited "assault weapons" by replacing the prior two-feature test with a stricter one-feature test. As the name suggests, the new test defines a semiautomatic firearm as a prohibited "assault weapon" if it contains any one of an enumerated list of military-style features, including a telescoping stock, a conspicuously protruding pistol grip, a thumbhole stock, a bayonet mount, a flash suppressor, a barrel shroud, and a grenade launcher. This statutory definition encompasses, and thereby bans, the semiautomatic weapon used by the mass-shooter at Sandy Hook. New York law makes the possession, manufacture, transport, or disposal of an "assault weapon" a felony. Pursuant to the SAFE Act's grandfather clause, however, pre-existing lawful owners of banned assault weapons may continue to possess them if they register those weapons with the New York State Police.

The SAFE Act also bans magazines that can hold more than ten rounds of ammunition or that can be readily restored or converted to accept more than ten rounds. Although New York had restricted possession of such magazines since 2000, the SAFE Act eliminated a grandfather clause for magazines manufactured before September 1994.

The SAFE Act's large-capacity-magazine ban contains an additional, unique prohibition on possession of a magazine loaded with more than seven rounds of ammunition. (For the purpose of this definition, a round is a single unit of ammunition.) As originally enacted, the SAFE Act would have imposed a magazine capacity restriction of seven rounds. Because very few seven-round magazines are manufactured, however, the law was subsequently amended to impose a ten-round capacity restriction coupled with a seven-round load limit. Thus, as amended, the statute permits a New York gun owner to possess a magazine capable of holding up to ten rounds, but he may not fully load it outside of a firing range or official shooting competition.

III. The Connecticut Legislation

Several months after New York passed the SAFE Act, and after extensive public hearings and legislative and executive study, Connecticut adopted "An Act Concerning Gun Violence Prevention and Children's Safety" on April 4, 2013, and later amended the 8 on June 18, 2013. Like its New York analogue, the Connecticut legislation replaced the state's two-feature definition of prohibited "assault weapons" with a stricter one-feature test, using a list of military-style features similar to New York's, including a telescoping stock, a thumbhole stock, a forward pistol grip, a flash suppressor, a grenade launcher, and a threaded barrel capable of accepting a flash suppressor or silencer. Unlike its counterpart in New York, the Connecticut legislation additionally bans 183 particular assault weapons listed by make and model, as well as "copies or duplicates" of most of those firearms. The Connecticut law makes it a felony to transport, import, sell, or possess semiautomatic "assault weapons," and it also contains a grandfather clause permitting pre-existing owners of assault weapons to continue to possess their firearms if properly registered with the state.

The June 2013 amendment to the Connecticut legislation criminalizes the possession of "[l]arge capacity magazine[s]" that can hold, or can be "readily restored or converted to accept," more than ten rounds of ammunition. Unlike its New York counterpart, however, the Connecticut legislation contains no additional "load limit" rule.

IV. Procedural History

Plaintiffs—a combination of advocacy groups, businesses, and individual gun owners—filed suit against the governors of New York and Connecticut and other state officials, first in the Western District of New York on March 21, 2013 and then in the District of Connecticut on May 22, 2013. In both actions, plaintiffs sought declaratory and injunctive relief for alleged infringement of their

constitutional rights. Specifically, plaintiffs contended that the statutes' prohibitions on semiautomatic assault weapons and large-capacity magazines violate their Second Amendment rights, and that numerous specific provisions of each statute are unconstitutionally vague. In the New York action, plaintiffs also challenged the seven-round load limit as a violation of the Second Amendment.

Following plaintiffs' motions for preliminary injunctions, parties in both suits cross-moved for summary judgment. On December 31, 2013, Chief Judge Skretny of the Western District of New York granted in part and denied in part the cross-motions for summary judgment. Specifically, the District Court found that New York's ban on assault weapons and large capacity magazines burdened plaintiffs' Second Amendment rights, but did not violate the Second Amendment upon application of so-called intermediate scrutiny. The Court also held, however, that the seven-round load limit did not survive intermediate scrutiny. * * * * In sum, Chief Judge Skretny upheld as constitutional, upon intermediate scrutiny, the core provisions of New York's SAFE Act restricting semiautomatic assault weapons and large-capacity magazines, but struck down certain marginal aspects of the law.

On January 30, 2014, Judge Covello of the District of Connecticut granted defendants' motion for summary judgment in its entirety. Like his counterpart in New York, Judge Covello held that the Connecticut legislation burdened plaintiffs' Second Amendment rights, applied intermediate scrutiny, and concluded that the prohibition on semiautomatic assault weapons and large-capacity magazines was fully consistent with the Second Amendment. * * * *

Plaintiffs thereafter appealed. In the New York action only, defendants cross-appeal the District Court's judgment insofar as it invalidated the SAFE Act's seven-round load limit and voided as unconstitutionally vague the SAFE Act's prohibitions on the misspelled "muzzle break" and "semiautomatic version[s]" of an automatic rifle, shotgun, or firearm.

DISCUSSION

These appeals present two questions: first, whether the Second Amendment permits the regulation of the assault weapons and large-capacity magazines at issue here; and second, whether the challenged provisions of the statutes provide constitutionally sufficient notice of the conduct proscribed {and are void for vagueness}.

We review de novo a district court's order granting summary judgment, construing the evidence in the light most favorable to the non-moving party. As relevant here, we also "review de novo the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute." * * * *

V. Second Amendment Challenge

We conclude that the core challenged prohibitions of assault weapons and large-capacity magazines do not violate the Second Amendment. Guided by the teachings of the Supreme Court, our own jurisprudence, and the examples provided by our sister circuits, we adopt a two-step analytical framework, determining first whether the regulated weapons fall within the protections of the Second Amendment and then deciding and applying the appropriate level of constitutional scrutiny. Only two specific provisions—New York's seven-round load limit, and Connecticut's prohibition on the non-semiautomatic Remington 7615—are unconstitutional.

a. *Heller* and *McDonald*

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Our analysis of that amendment begins with the seminal decision in *District of Columbia v. Heller* (2008). In *Heller*, the Supreme Court, based on an extensive textual and historical analysis, announced that the Second Amendment's operative clause codified a pre-existing "individual right to possess and carry weapons." Recognizing, however, that "the right secured by the Second Amendment is not unlimited," *Heller* emphasized that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Instead, the Second Amendment protects only those weapons " 'in common use' " by citizens "for lawful purposes like self-defense."

Having established these basic precepts, *Heller* concluded that the District of Columbia's ban on possession of handguns was unconstitutional under the Second Amendment. The Supreme Court noted that "handguns are the most popular weapon chosen by Americans for self-defense in the home," where, the Court observed, "the need for defense of self, family, and property is most acute."

Heller stopped well short of extending its rationale to other firearms restrictions. Indeed, *Heller* explicitly identified as "presumptively lawful" such "regulatory measures" as "prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." Most importantly here, Heller also endorsed the "historical tradition of prohibiting the carrying of dangerous and unusual weapons."

Aside from these broad guidelines, *Heller* offered little guidance for resolving future Second Amendment challenges. The Court did imply that such challenges are subject to one of "the standards of scrutiny that we have applied to enumerated constitutional rights," though it declined to say which, accepting that many applications of the Second Amendment would remain "in doubt."

That doubt persisted after *McDonald v. City of Chicago* (2010) in which the Supreme Court invalidated municipal statutes banning handguns in the home. *McDonald* was a landmark case in one respect—the Court held for the first time that the Fourteenth Amendment "incorporates" the Second Amendment against the states. Otherwise, *McDonald* did not expand upon *Heller*'s analysis and simply reiterated *Heller*'s assurances regarding the viability of many gun-control provisions. Neither *Heller* nor *McDonald*, then, delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions.

b. Analytical Rubric

Lacking more detailed guidance from the Supreme Court, this Circuit has begun to develop a framework for determining the constitutionality of firearm restrictions. It requires a two-step inquiry.

First, we consider whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands. Otherwise, we move to the second step of our inquiry, in which we must determine and apply the appropriate level of scrutiny.

This two-step rubric flows from the dictates of *Heller* and *McDonald* and our own precedents in *Kachalsky* and *Decastro*. It also broadly comports with the prevailing two-step approach of other courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, and with the approach used in "other areas of constitutional law."

c. First Step: Whether the Second Amendment Applies

As an initial matter, then, we must determine whether the challenged legislation impinges upon conduct protected by the Second Amendment. The Second Amendment protects only "the sorts of weapons" that are (1) "in common use" and (2) "typically possessed by law-abiding citizens for lawful purposes." We consider each requirement in turn.

i. Common Use

The parties contest whether the assault weapons at issue here are commonly owned. Plaintiffs argue that the weapons at issue are owned in large numbers by law-abiding Americans. They present statistics showing that nearly four million units of a single assault weapon, the popular AR–15, have been manufactured between 1986 and March 2013. Plaintiffs further assert that only 7.5 percent of assault-weapon owners are active law enforcement officers, and that most owners of assault weapons own only one or two such weapons, such that the banned firearms are not concentrated in a small number of homes, but rather spread widely among the gun-owning public. Defendants counter that assault weapons only represent about two percent of the nation's firearms (admittedly amounting to approximately seven million guns). Moreover, defendants argue that the statistics inflate the number of individual civilian owners because many of these weapons are purchased by law enforcement or smuggled to criminals, and many civilian gun owners own multiple assault weapons.

This much is clear: Americans own millions of the firearms that the challenged legislation prohibits.

The same is true of large-capacity magazines, as defined by the New York and Connecticut statutes. Though fewer statistics are available for magazines, those statistics suggest that about 25 million large-capacity magazines were available in 1995, shortly after the federal assault weapons ban was enacted, and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000.

Even accepting the most conservative estimates cited by the parties and by *amici*, the assault weapons and large-capacity magazines at issue are "in common use" as that term was used in *Heller*. The D.C. Circuit reached the same conclusion in its well-

reasoned decision in *Heller II*, which upheld the constitutionality of a District of Columbia gun-control act substantially similar to those at issue here.

To be sure, as defendants note, these assault weapons and large-capacity magazines are not as commonly owned as the handguns at issue in *Heller*, which were "the most popular weapon chosen by Americans for self-defense in the home." But nothing in *Heller* limited its holding to handguns; indeed, the Court emphasized that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," not just to a small subset.

ii. Typical Possession

We must next determine whether assault weapons and large-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes." While "common use" is an objective and largely statistical inquiry, "typical[ ] possess[ion]" requires us to look into both broad patterns of use and the subjective motives of gun owners.

The parties offer competing evidence about these weapons' "typical use." Plaintiffs suggest that assault weapons are among the safest and most effective firearms for civilian self-defense. Defendants disagree, arguing that these weapons are used disproportionately in gun crimes, rather than for lawful pursuits like self-defense and hunting.

Even if defendants are correct, however, the same could be said for the handguns in *Heller.* Though handguns comprise only about one-third of the nation's firearms, by some estimates they account for 71 percent to 83 percent of the firearms used in murders and 84 percent to 90 percent of the firearms used in other violent crimes. That evidence of disproportionate criminal use did not prevent the Supreme Court from holding that handguns merited constitutional protection.

Looking solely at a weapon's association with crime, then, is insufficient. We must also consider more broadly whether the weapon is "dangerous and unusual" in the hands of law-abiding civilians. *Heller* expressly highlighted "weapons that are most useful in military service," such as the fully automatic M–16 rifle, as weapons that could be banned without implicating the Second Amendment. But this analysis is difficult to manage in practice. Because the AR–15 is "the civilian version of the military's M–16 rifle," defendants urge that it should be treated identically for Second Amendment purposes. But the Supreme Court's very choice of descriptor for the AR–15—the "civilian version"—could instead imply that such guns are "traditionally have been widely accepted as lawful."

Ultimately, then, neither the Supreme Court's categories nor the evidence in the record cleanly resolves the question of whether semiautomatic assault weapons and large-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes." Confronting this record, Chief Judge Skretny reasonably found that reliable empirical evidence of lawful possession for lawful purposes was "elusive," beyond ownership statistics. We agree.

In the absence of clearer guidance from the Supreme Court or stronger evidence in the record, we follow the approach taken by the District Courts and by the D.C. Circuit in *Heller II* and assume for the sake of argument that these "commonly used" weapons and magazines are also "typically possessed by law-abiding citizens for lawful purposes." In short, we proceed on the assumption that these laws ban weapons protected by the Second Amendment. This assumption is warranted at this stage, because, the statutes at issue nonetheless largely pass constitutional muster.

d. Second Step: Level of Scrutiny

Having concluded that the statutes impinge upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny. We employ the familiar "levels of scrutiny" analysis introduced in the famous Footnote Four of *United States v. Carolene Products Co.*, and begin by asking which level of judicial "scrutiny" applies.

Though *Heller* did not specify the precise level of scrutiny applicable to firearms regulations, it rejected mere rational basis review as insufficient for the type of regulation challenged there. At the same time, this Court and our sister Circuits have suggested that heightened scrutiny is not always appropriate. In determining whether heightened scrutiny applies, we consider two factors: (1) "how close the law comes to the core of the Second Amendment right" and (2) "the severity of the law's burden on the right." Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.

i. The Core of the Right

By their terms, the statutes at issue implicate the core of the Second Amendment's protections by extending into the home, "where the need for defense of self, family and property is most acute." Semiautomatic assault weapons and large-capacity magazines are commonly owned by many law-abiding Americans, and their complete prohibition, including within the home, requires us to consider the scope of Second Amendment guarantees "at their zenith." At the same time, the regulated weapons are not nearly as popularly owned and used for self-defense as the handgun, that "quintessential self-defense weapon." Thus these statutes implicate Second Amendment rights, but not to the same extent as the laws at issue in *Heller* and *McDonald*.

ii. The Severity of the Burden

In *Decastro* {*United States v. Decastro*, 2nd Cir. 2012} we explained that heightened scrutiny need not apply to "any marginal, incremental or even appreciable restraint on the right to keep and bear arms." Rather, "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for . . . lawful purposes." Our later decision in *Kachalsky {v. Cty of Westchester*, 2nd Cir. 2012} confirmed this approach, concluding that "some form of heightened scrutiny would be appropriate" for regulations that impose a "substantial burden" on Second Amendment rights.

The practice of applying heightened scrutiny only to laws that "burden the Second Amendment right *substantially*" is, as we noted in *Decastro*, broadly consistent with our approach to other fundamental constitutional rights, including those protected by the First and Fourteenth Amendments. We typically require a threshold showing to trigger heightened scrutiny of laws alleged to implicate such constitutional contexts as takings, voting rights, and free speech. Though we have historically expressed "hesitan[ce] to import substantive First Amendment principles wholesale into Second Amendment jurisprudence," we readily "consult principles from other areas of constitutional law, including the First Amendment" in determining whether a law "substantially burdens Second Amendment rights."

The scope of the legislative restriction and the availability of alternatives factor into our analysis of the "degree to which the challenged law burdens the right." No "substantial burden" exists—and hence heightened scrutiny is not triggered—"if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense."

The laws at issue are both broad and burdensome. Unlike statutes that "merely regulate the *manner* in which persons may exercise their Second Amendment rights," these laws impose an outright ban statewide. The "absolute *prohibition*" instituted in both states thus creates a "serious encroachment" on the Second Amendment right. These statutes are not mere "marginal, incremental or even appreciable restraint[s] on the right to keep and bear arms." They impose a substantial burden on Second Amendment rights and therefore trigger the application of some form of heightened scrutiny.

Heightened scrutiny need not, however, "be akin to strict scrutiny when a law burdens the Second Amendment"—particularly when that burden does not constrain the Amendment's "core" area of protection. The instant bans are dissimilar from D.C.'s unconstitutional prohibition of "an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. New York and Connecticut have not banned an entire class of arms. Indeed, plaintiffs themselves acknowledge that there is no class of firearms known as "semiautomatic assault weapons"—a descriptor they call purely political in nature. Plaintiffs nonetheless argue that the legislation does prohibit "firearms of a universally recognized type—semiautomatic." Not so. Rather, both New York and Connecticut ban only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features. As *Heller* makes plain, the fact that the statutes at issue do not ban "an entire class of 'arms' " makes the restrictions substantially less burdensome. In both states, citizens may continue to arm themselves with non-semiautomatic weapons or with any semiautomatic gun that does not contain any of the enumerated military-style features. Similarly, while citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds. In sum, numerous "alternatives remain for law-abiding citizens to acquire a firearm for self-defense." We agree with the D.C. Circuit that "the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." The burden imposed by the challenged legislation is real, but it is not "severe."

Accordingly, we conclude that intermediate, rather than strict, scrutiny is appropriate. This conclusion coheres not only with that reached by the D.C. Circuit when considering substantially similar gun-control laws, but also with the analyses undertaken by other courts, many of which have applied intermediate scrutiny to laws implicating the Second Amendment.

e. Application of Intermediate Scrutiny

Though "intermediate scrutiny" may have different connotations in different contexts, here the key question is whether the statutes at issue are "substantially related to the achievement of an important governmental interest." It is beyond cavil that both states have "substantial, indeed compelling, governmental interests in public safety and crime prevention." We need only inquire, then, whether the challenged laws are "substantially related" to the achievement of that governmental interest. We conclude that the prohibitions on semiautomatic assault weapons and large-capacity magazines meet this standard.

i. Prohibition on "Assault Weapons"

To survive intermediate scrutiny, the "fit between the challenged regulation [and the government interest] need only be substantial, not perfect." Unlike strict scrutiny analysis, we need not ensure that the statute is "narrowly tailored" or the "least restrictive available means to serve the stated governmental interest." Moreover, we have observed that state regulation of the right to bear arms "has always been more robust" than analogous regulation of other constitutional rights. So long as the defendants produce evidence that "fairly support[s]" their rationale, the laws will pass constitutional muster.

In making this determination, we afford "substantial deference to the predictive judgments of the legislature." We remain mindful that, "[i]n the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." Our role, therefore, is only to assure ourselves that, in formulating their respective laws, New York and Connecticut have "drawn reasonable inferences based on substantial evidence."

Both states have done so with respect to their prohibitions on certain semiautomatic firearms. At least since the enactment of the federal assault-weapons ban, semiautomatic assault weapons have been understood to pose unusual risks. When used, these weapons tend to result in more numerous wounds, more serious wounds, and more victims. These weapons are disproportionately used in crime, and particularly in criminal mass shootings like the attack in Newtown. They are also disproportionately used to kill law enforcement officers: one study shows that between 1998 and 2001, assault weapons were used to gun down at least twenty percent of officers killed in the line of duty.

The record reveals that defendants have tailored the legislation at issue to address these particularly hazardous weapons. The dangers posed by some of the military-style features prohibited by the statutes—such as grenade launchers and silencers—are manifest and incontrovertible. As for the other enumerated military-style features—such as the flash suppressor, protruding grip, and barrel shrouds—New York and Connecticut have determined, as did the U.S. Congress, that the "net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." Indeed, plaintiffs explicitly contend that these features improve a firearm's "accuracy," "comfort," and "utility." This circumlocution is, as Chief Judge Skretny observed, a milder way of saying that these features make the weapons more deadly.

The legislation is also specifically targeted to prevent mass shootings like that in Newtown, in which the shooter used a semiautomatic assault weapon. Plaintiffs complain that mass shootings are "particularly rare events" and thus, even if successful, the legislation will have a "minimal impact" on most violent crime. That may be so. But gun-control legislation "need not strike at all evils at the same time" to be constitutional.

Defendants also have adduced evidence that the regulations will achieve their intended end of reducing circulation of assault weapons among criminals. Plaintiffs counter—without record evidence—that the statutes will primarily disarm law-abiding citizens and will thus impair the very public-safety objectives they were designed to achieve. Given the dearth of evidence that law-abiding citizens typically use these weapons for self-defense, plaintiffs' concerns are speculative at best, and certainly not strong enough to overcome the "substantial deference" we owe to "predictive judgments of the legislature" on matters of public safety. The mere possibility that some subset of people intent on breaking the law will indeed ignore these statutes does not make them unconstitutional.

Ultimately, "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." We must merely ensure that the challenged laws are substantially—even if not perfectly—related to the articulated governmental interest. The prohibition of semiautomatic assault weapons passes this test.

ii. Prohibition on Large–Capacity Magazines

The same logic applies a fortiori to the restrictions on large-capacity magazines. The record evidence suggests that large-capacity magazines may "present even greater dangers to crime and violence than assault weapons alone, in part because they are more prevalent and can be and are used in both assault weapons and non-assault weapons." Large-capacity magazines are disproportionately used in mass shootings, like the one in Newtown, in which the shooter used multiple large-capacity magazines to fire 154 rounds in less than five minutes. Like assault weapons, large-capacity magazines result in "more shots fired, persons wounded, and wounds per victim than do other gun attacks." Professor Christopher Koper, a firearms expert relied upon by all parties in both states, stated that it is "particularly" the ban on large-capacity magazines that has the greatest "potential to prevent and limit shootings in the state over the long-run."

We therefore conclude that New York and Connecticut have adequately established a substantial relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important—indeed, compelling—state interest in controlling crime. These prohibitions survive intermediate scrutiny.

iii. Seven–Round Load Limit

Though the key provisions of both statutes pass constitutional muster on this record, another aspect of New York's SAFE Act does not: the seven-round load limit, which makes it "unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition."

As noted above, the seven-round load limit was a second-best solution. New York determined that only magazines containing seven rounds or fewer can be safely possessed, but it also recognized that seven-round magazines are difficult to obtain commercially. Its compromise was to permit gun owners to use ten-round magazines if they were loaded with seven or fewer rounds.

On the record before us, we cannot conclude that New York has presented sufficient evidence that a seven-round load limit would best protect public safety. Here we are considering not a capacity restriction, but rather a load limit. Nothing in the SAFE Act will outlaw or reduce the number of ten-round magazines in circulation. It will not decrease their availability or in any way frustrate the access of those who intend to use ten-round magazines for mass shootings or other crimes. It is thus entirely untethered from the stated rationale of reducing the number of assault weapons and large capacity magazines in circulation. New York has failed to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.

To be sure, the mere possibility of criminal disregard of the laws does not foreclose an attempt by the state to enact firearm regulations. But on intermediate scrutiny review, the state cannot "get away with shoddy data or reasoning." To survive intermediate scrutiny, the defendants must show "reasonable inferences based on substantial evidence" that the statutes are substantially related to the governmental interest. With respect to the load limit provision alone, New York has failed to do so.

VI.

Vagueness Challenge

{omitted}

CONCLUSION

To summarize, we hold as follows:

(1) The core prohibitions by New York and Connecticut of assault weapons and large-capacity magazines do not violate the Second Amendment.

(a) We assume that the majority of the prohibited conduct falls within the scope of Second Amendment protections. The statutes are appropriately evaluated under the constitutional standard of "intermediate scrutiny"—that is, whether they are "substantially related to the achievement of an important governmental interest."

(b) Because the prohibitions are substantially related to the important governmental interests of public safety and crime reduction, they pass constitutional muster.

We therefore AFFIRM the relevant portions of the judgments of the Western District of New York and the District of Connecticut insofar as they upheld the constitutionality of state prohibitions on semiautomatic assault weapons and large-capacity magazines.

(2) We hold that the specific prohibition on the non-semiautomatic Remington 7615 falls within the scope of Second Amendment protection and subsequently fails intermediate scrutiny. Accordingly, we REVERSE that limited portion of the judgment of the District of Connecticut. In doing so, we emphasize the limited nature of our holding with respect to the Remington 7615, in that it merely reflects the presumption required by the Supreme Court in *District of Columbia v. Heller* that the Second Amendment extends to all bearable arms, and that the State, by failing to present any argument at all regarding this weapon or others like it, has failed to rebut that presumption. We do not foreclose the possibility that States could in the future present evidence to support such a prohibition.

(3) New York's seven-round load limit does not survive intermediate scrutiny in the absence of requisite record evidence and a substantial relationship between the statutory provision and important state safety interests. We therefore AFFIRM the judgment of the Western District of New York insofar as it held this provision unconstitutional.

(4) No challenged provision in either statute is unconstitutionally vague. Accordingly, we AFFIRM the judgments of the District of Connecticut and the Western District of New York insofar as they denied vagueness challenges to provisions involving the capacity of tubular magazines, "copies or duplicates," or a firearm's ability to "be readily restored or converted." We REVERSE the judgment of the Western District of New York insofar as it found language pertaining to "versions" and "muzzle breaks" to be unconstitutionally vague.

Check Your Understanding

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes

1. Be prepared to discuss the holdings of *Heller* and *McDonald*. Pay attention to the chronological sequence of cases. Why would Second Amendment advocates advance the claims in *Heller* before those in *McDonald*?

2. Like *McDonald*, *Heller* has extensive opinions totaling over 150 pages and our version is again heavily edited. Do you agree with the majority's textual reading of the Second Amendment? Can you tell what the contrary interpretation would be?

3. Be prepared to apply the "analytic rubric" of the Second Circuit in *New York State Rifle and Pistol Ass'n v. Cuomo* to any regulation.

Note: New York State Rifle and Pistol Ass'n v. City of New York

In the 2019-2020 Term, the United States Supreme Court granted certiorari to another Second Circuit opinion applying the settled "analytic framework" to a New York City gun regulation. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *cert. granted New York State Rifle & Pistol Ass'n, Inc. v. City of New York, N.Y.*, ___ U.S.___, 139 S. Ct. 939, 203 L. Ed. 2d 130 (2019).

The regulation at issue in *New York State Rifle & Pistol v. City of New York* was part of the New York City gun licensing scheme, Title 38, Chapter Five, Section 23 of the Rules of the City of New York ("RCNY"), under which an individual with a "premises license" for a handgun may not remove the handgun "from the address specified on the license except as otherwise provided in this chapter." 38 RCNY § 5-23(a)(1). Under Rule 5-23 ("the Rule"), the licensee "may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately." *Id*. § 5-23(a)(3). The New York Police Department–License Division ("License Division") has defined "authorized" facilities, among other requirements, to be "those located in New York City." The Plaintiffs sought to remove handguns from the licensed premises for the purposes of going to shooting ranges and engaging in target practice outside New York City as well as, in the case of one Plaintiff, transporting the handgun to a second home in upstate New York.

The Second Circuit upheld the constitutionality of the rule, applying intermediate scrutiny because the burden was not substantial, reasoning that one could obtain a gun at the firing range or obtain a license in the location of the second home for a second gun. The Second Circuit concluded that the Rule makes a contribution to an important state interest in public safety substantial enough to easily justify the insignificant and indirect costs it imposes on Second Amendment interests.

The Second Circuit also held that the New York City rule did not violate the right to interstate travel (or the Commerce Clause).

After the United States Supreme Court granted certiorari, New York City amended its rule, effective July 21, 2019, *see*https://rules.cityofnewyork.us/content/premise-handgun-license-amendment.

The amended rule added specific language to provide that owners of a premises license for a handgun may transport the licensed firearm to

> (i) Another residence or place of business where the licensee is authorized to possess such handgun.
>
> (ii) A small arms range/shooting club authorized by law to operate as such. Such range or club may be within or outside New York City.
>
> (iii) A shooting competition at which the licensee is authorized to possess such handgun consistent with the law applicable at the place of such competition.

In a brief per curiam opinion, the Court held that given the New York City amended rule, the "claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot," *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 590 U.S. ___, 140 S. Ct. 1525, 206 L. Ed. 2d 798 (2020). The Court did remand for consideration of whether a damages claim could be added. Justice Alito dissented, joined by Justice Gorsuch and in part by Justice Thomas.

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1.12: CHAPTER TEN- Unenumerated Rights and Due Process

Lochner v. New York

198 U.S. 45 (1905)

Peckham, J., for the Court, joined by Fuller, C.J., and Brewer, Brown, and McKenna, J.J. Harlan, J., dissenting joined by White and Day, J.J. Holmes, J., dissenting.

Peckham, J., for the Court.

The indictment, it will be seen, charges that the plaintiff in error violated the 110th section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the state of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the supreme court or the court of appeals of the state, which construes the section, in using the word 'required,' as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. * * * * It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

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

* * * * {W}hen the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,-the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state. * * * *

The latest case decided by this court, involving the police power, is that of *Jacobson v. Massachusetts* (1905) * * * * related to compulsory vaccination, and the law was held vaild as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case 'of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.' That case is also far from covering the one now before the court.

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

relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

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

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

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

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

unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

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

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

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. * * * *

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. * * * * It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

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

REVERSED.

Mr. Justice Holmes dissenting:

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

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their

opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*. * * * * Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. *Otis v. Parker* (1903). The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy* (1898). Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first 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.

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Meyer v. Nebraska

262 U.S. 390 (1923)

Mr. 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, who had not attained and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919 (Laws 1919, c. 249), 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.

'Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.'

The Supreme Court of the state affirmed the judgment of conviction. * * * *

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: 'No state … shall deprive any person of life, liberty or property without due

process of law.'

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.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. * * * * 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.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. 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.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution— a desirable end cannot be promoted by prohibited means.

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 therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. * * * *As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. 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.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

Mr. Justice Holmes and Mr. Justice Sutherland, dissent.

Pierce v. Society of Sisters
268 U.S. 510 (1925)

Mr. 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 1 adopted November 7, 1922 * * * * by the voters of Oregon. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

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. There are exemptions-not specially important here-for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative-the annual income from primary schools exceeds $30,000-and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. The average attendance is 100, and the annual fees received for each student amount to some $800. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the state board of education. Military instruction and training are also given, under the supervision of an army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the state and county, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

* * * * The {three judge} court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. * * * *

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

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. * * * *

The decrees below are affirmed.

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Notes

1. *Lochner* gives its name to the so-called *Lochner* Era which is generally thought to begin with *Alleyer v. Louisana*, 165 U.S. 578 (1897) and to end with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) in which the Court upheld a minimum wage law. In the mid-1930s, the United States was in the midst of the Great Depression and President Franklin Delano Roosevelt was exerting political pressure to "convince" the Court to sustain economic legislation.

The *Lochner* era was marked by the Court's tendency to declare laws unconstitutional, often but not always on substantive due process grounds. Generally speaking, the laws declared unconstitutional sought to regulate businesses and were deemed to interfere with the "liberty of contract." This is sometimes called "economic liberty" and has adherents today.

The generally accepted estimate of laws declared unconstitutional by the Court during the 40 year *Lochner* era is 200, but again not all of these were on due process grounds. (For example, in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court declared a Congressional statute seeking to regulate child labor as beyond the power of Congress). Nevertheless, the *Lochner* era is closely associated with "liberty," due process, and the issue of unenumerated rights.

2. In ***Williamson v. Lee Optical Co***., 348 U.S. 483 (1955), the Court, in an opinion by Justice Douglas reversed a lower court's finding that an Oklahoma statute regulating opticians violated the Due Process Clause. The statute regulated the various duties of optometrists and opticians: its effect was 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 Court stated:

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. We emphasize again what Chief Justice Waite said in *Munn v. Illinois* (1876), "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

3. The "Ghost of *Lochner*" is said to "haunt" substantive due process. If people should "resort to the polls" for relief from laws that infringe their "fundamental rights," the courts would be rendered irrelevant in such cases. Given that there are successful substantive due process challenges, the issue in post-*Lochner* era cases is how the courts avoid the error of *Lochner*.

4. Both *Meyer v. Nebraska* and *Pierce v. Society of Sisters* are *Lochner* era cases, but they are also considered foundational cases for privacy doctrine, especially family privacy. Be prepared to discuss the passages and arguments in the cases that are more closely related to economic liberty and those that are more closely related to family privacy.

Griswold v. Connecticut

381 U.S. 479 (1965)

Douglas, J., wrote the opinion for the Court, joined by Warren, C.J., Clark, Brennan, and Goldberg, J.J. Goldberg, J., filed a concurring opinion, joined by Warren, C.J., and Brennan, J. Harlan, J., and White, J., filed separate concurring opinions. Black, J., filed a dissenting opinion joined by Stewart, J. Stewart, J., filed a dissenting opinion, joined by Black, J.

Mr. Justice Douglas delivered the opinion of the Court.

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

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

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

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

Section 54-196 provides:

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

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. We noted probable jurisdiction.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. * * * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* (1905) should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* (1937); *Williamson v. Lee Optical Co.* (1955). We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

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

By *Pierce v. Society of Sisters*, the right to educate one’s children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach – indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama* (1958) we protected the “freedom to associate and privacy in one’s associations,” noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid “as entailing the likelihood of a substantial restraint upon the exercise by petitioner’s members of their right to freedom of association.” Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of “association” that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. In *Schware v. Board of Bar Examiners* (1957) we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man’s “association with that Party” was not shown to be “anything more than a political faith in a political party” and was not action of a kind proving bad moral character.

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

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described in *Boyd v. United States* (1886), as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio* (1961) to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

Mr.Justice Goldberg, whom The Chief Justice and Mr. Justice Brennan join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court's holding. * * * *

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* (1803). In interpreting the Constitution, "real effect should be given to all the words it uses." The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

* * * * {t}he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. * * * *The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

* * * * 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.

Mr. Justice Harlan, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

* * * * In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937). * * * *

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times." * * * *

Mr. Justice White, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute. * * * *

Mr.Justice Black, with whom Mr. Justice Stewart joins, dissenting. {omitted}

Mr. Justice Stewart, whom Mr. Justice Black joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. *Lochner v. New York* (1905).

* * * * What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

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Roe v. Wade

410 U.S. 113 (1973)

Blackmun, J., delivered the opinion of the Court, in which Burger, C.J., and Douglas, Brennan, Stewart, Marshall, and Powell, JJ., joined. Burger, C.J., Douglas, J., and Stewart, J., filed concurring opinions. White, J., filed a dissenting opinion, in which Rehnquist, J., joined. Rehnquist, J., filed a dissenting opinion.

Mr. Justice Blackmun delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York* (1905):

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

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

Texas first enacted a criminal abortion statute in 1854. * * * *

II

Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated. * * * *

* * * * On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. * * * *

III – IV

{discussion of procedural issues, standing, and ripeness, and abstention omitted}

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut* (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

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.

* * * *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.

* * * *

{The Court discussed recent proceedings by the American Medical Ass'n and then continued to the American Bar Ass'n}: At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. We set forth the Act in full in the margin. {The ABA position allowed abortions performed by medical doctors within 20 weeks of commencement of pregnancy and after that time if the physician has "reasonable cause to believe" (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years."}

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. * * * *

Modern medical techniques have altered this situation. * * * * 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.

VIII

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. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, *Griswold v. Connecticut* (1965); in the Ninth Amendment, *id.* (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska* (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia* (1967); procreation, *Skinner v. Oklahoma* (1942); contraception, *Eisenstadt v. Baird* (1972); family relationships, *Prince v. Massachusetts* (1944); and child rearing and education, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923).

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts* (1905) (vaccination); *Buck v. Bell* (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. * * * * {Although} others have sustained state statutes.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

In the recent abortion cases, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A

The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in § 2 and § 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. * * * * This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. * * * * In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after

viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

* * * * This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case. * * * *

Mr. Justice Rehnquist, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

{discussion of standing omitted}

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. 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.

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 Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York* (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." 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," Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

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.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down in toto, even though the Court apparently concedes that, at later periods of pregnancy Texas might impose these self-same statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a

particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins* (1886).

For all of the foregoing reasons, I respectfully dissent.

Check Your Understanding

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Washington v. Glucksberg

521 U.S. 702 (1997)

Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined. O'Connor, J., filed a concurring opinion, in which Ginsburg and Breyer, JJ., joined in part. Stevens, J., Souter, J., Ginsburg, J., and Breyer, J., filed opinions concurring in the judgment.

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. At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide."

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 Wash Rev. Code 9A.36.060(1) (1994) is, on its face, unconstitutional.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide." Relying primarily on *Planned Parenthood v. Casey* (1992), and *Cruzan v. Director, Missouri Dept. of Health* (1990), the District Court agreed, and concluded that Washington's assisted suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." * * * *

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "[i]n the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction." The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.' " After "[w]eighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." * * * * We granted certiorari and now reverse.

I

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.

* * * *

More specifically, for over 700 years, the Anglo American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide. In the 13th century, Henry de Bracton, one of the first legal treatise writers, observed that "[j]ust as a man may commit felony by slaying another so may he do so by slaying himself." The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the king; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . [only] his movable goods [were] confiscated." Thus, "[t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was . . . introduced into English common law." Centuries later, Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers, referred to suicide as "self murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure . . . ." Blackstone emphasized that "the law has . . . ranked [suicide] among the highest crimes," although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "borde[r] a little upon severity."

For the most part, the early American colonies adopted the common law approach. * * * * Over time, however, the American colonies abolished these harsh common law penalties. William Penn abandoned the criminal forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example. * * * *

Nonetheless, although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong.

* * * *

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, and many of the new States and Territories followed New York's example. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide.

* * * * In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted suicide bans. The Code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980).

Though deeply rooted, the States' assisted suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. 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. * * * *

Thus, the States are currently engaged in serious, thoughtful examinations of physician assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law—an ongoing, blue ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen—was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." Over the past decade, the Task Force has recommended laws relating to end of life decisions, surrogate pregnancy, and organ donation. After studying physician assisted suicide, however, the Task Force unanimously concluded that "[l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. . . . [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved."

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end of life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia* (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson* (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska* (1923); *Pierce v. Society of Sisters* (1925); to marital privacy, *Griswold v. Connecticut* (1965); to use contraception, *Griswold*, *Eisenstadt v. Baird* (1972); to bodily integrity, *Rochin v. California* (1952), and to abortion, *Casey*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*.

But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this 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," *Palko v. Connecticut* (1937). Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently, the Fourteenth Amendment "forbids the government to infringe . . . "fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

* * * * In our view * * * * the development of this Court's substantive due process jurisprudence, * * * * has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death." As noted above, we have a tradition of carefully formulating the interest at stake in substantive due process cases. For example, although *Cruzan* is often described as a "right to die" case, we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*. The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide" and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

We now inquire whether this asserted right has any place in our Nation's traditions. Here * * * * we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Respondents contend, however, that the liberty interest they assert is consistent with this Court's substantive due process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self sovereignty," and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy," see *Casey* ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end of life decisions free of undue government interference." The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, "ha[d] a right under the United States Constitution which would require the hospital to withdraw life sustaining treatment" at her parents' request. We began with the observation that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery." We then discussed the related rule that "informed consent is generally required for medical treatment." After reviewing a long line of relevant state cases, we concluded that "the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." Next, we reviewed our own cases on the subject, and stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Therefore, "for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life sustaining treatment.

* * * * The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide.

Respondents also rely on *Casey*. There, the Court's opinion concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. In reaching this conclusion, the opinion discussed in some detail this Court's substantive due process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime."

* * * * That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Independent School Dist. v. Rodriguez* (1973), and *Casey* did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here. As the court below recognized, Washington's assisted suicide ban implicates a number of state interests.

First, Washington has an "unqualified interest in the preservation of human life." The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. This interest is symbolic and aspirational as well as practical * * * * Respondents admit that "[t]he State has a real interest in preserving the lives of those who can still contribute to

society and enjoy life." The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." Washington, however, has rejected this sliding scale approach and, through its assisted suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy." This remains true, as *Cruzan* makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public health problem, especially among persons in otherwise vulnerable groups. The State has an interest in preventing suicide, and in studying, identifying, and treating its causes.

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). * * * * The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. Thus, legal physician assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician assisted suicide]," the American Medical Association, like many other medical and physicians' groups, has concluded that "[p]hysician assisted suicide is fundamentally incompatible with the physician's role as healer." 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. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician assisted suicide as "ludicrous on its face." We have recognized, however, the real risk of subtle coercion and undue influence in end of life situations. *Cruzan*. Similarly, the New York Task Force warned that "[l]egalizing physician assisted suicide would pose profound risks to many individuals who are ill and vulnerable . . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." If physician assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end of life health care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." The State's assisted suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down Washington's assisted suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." Washington insists, however, that the impact of the court's decision will not and cannot be so limited. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." * * * * 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. We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors."

* * *

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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 this case 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 Washington statute at issue in this case prohibits 'aid[ing] another person to attempt suicide,'. . . and, thus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so"). 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." *Cruzan* (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann* (1932)).

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. * * * *

Justice Souter, concurring in the judgment {omitted}.

Check Your Understanding

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Note: Bowers v. Hardwick

In *Bowers v. Harwick*, 478 U.S. 186 (1986), the Court in a 5-4 decision reversing the Eleventh Circuit upheld the constitutionality of Georgia's sodomy statute that provided "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ." The opinion by Justice White for the Court stated:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International* (1977). *Pierce v. Society of Sisters* (1925), and *Meyer v. Nebraska* (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts* (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson* (1942), with procreation; *Loving v. Virginia* (1967), with marriage; *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972) with contraception; and *Roe v. Wade* (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted {in footnotes} that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor

justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *See also Griswold v. Connecticut.*

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls for short of overcoming this resistance.

* * * *

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Accordingly, the judgment of the Court of Appeals is

Reversed.

The brief concurring opinion by Chief Justice Burger stressed the "ancient roots" of proscriptions against sodomy, citing Roman law, Henry VIII, and Blackstone. The brief concurring opinion by Justice Powell suggested that there may be some protection under the Eighth Amendment: "The Georgia statute at issue in this case, Ga. Code Ann. 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct – certainly a sentence of long duration – would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, 16-5-24, first-degree arson, 16-7-60, and robbery, 16-8-40." But, Justice Powell noted, Hardwick had not been tried, found guilty, sentenced, or raised this issue below.

The dissenting opinion by Justice Blackmun, joined by Brennan, Marshall, and Stevens, begins thusly:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States* (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."*Olmstead v. United States* (1928) (Brandeis, J., dissenting).

The statute at issue denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." But the fact that the moral judgments expressed by statutes like 16-6-2 may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Roe v. Wade* (1973), *quoting Lochner v. New York* (1905) (Holmes, J., dissenting). Like

Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.'" *Herring v. State*, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

The dissenting opinion engages in a lengthy analysis, often stressing the private nature of the act and arguing that the case "involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently." The dissent concludes:

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis* (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. *See West Virginia Board of Education v. Barnette* (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

Lawrence v. Texas

539 U.S. 558 (2003)

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

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).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art.1, §

3a. Those contentions were rejected. The petitioners, having entered a plea of nolo contendere, were each fined $200 and assessed court costs of $141.25.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case *en banc* the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick* (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari to consider three questions:

"1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?

"2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

"3. Whether *Bowers v. Hardwick* (1986) should be overruled?"

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters* (1925), and *Meyer v. Nebraska* (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut* (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird* (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights. It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . 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.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade* (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l* (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

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. Four Justices dissented (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. Brief for Cato Institute as *Amicus Curiae* 16-17; Brief for American Civil Liberties Union etal. as *Amici Curiae* 15-21; Brief for Professors of History et al. as *Amici Curiae* 3-10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy 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. See, e.g., *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). 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. *See, e.g.*, 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47-50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). 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. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms homosexuality and heterosexuality do not apply to an era that had not yet articulated these distinctions"). 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.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. The rule may explain in part the infrequency of these prosecutions. 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. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p.652; 1974 Ky. Acts p.847; 1977 Mo. Laws p.687; 1973 Mont. Laws p.1339; 1977 Nev. Stats. p.1632; 1989 Tenn. Pub. Acts ch.591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) (sodomy law invalidated as applied to different-sex couples). 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. *See, e.g., Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S.W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. § 201.193).

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).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting

point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis* (1998) (Kennedy, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p.372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

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.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

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. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction. This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. *See, e.g.*,C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. * * * * Justice Stevens' analysis {in the dissenting opinion in *Bowers v. Hardwick*}, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual

lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'Connor, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick* (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.* (1985) * * * * 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.

* * * * 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."

* * * * 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:

“Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*[,] . . . its decision has a dimension that the resolution of the normal case does not carry. . . . [T]o overrule under fire in the absence of the most compelling reason . . . would subvert the Court’s legitimacy beyond any serious question.”

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*. * * * *

I do not quarrel with the Court’s claim that *Romer v. Evans* (1996) “eroded” the “foundations” of *Bowers*’ rational-basis holding. But *Roe* and *Casey* have been equally “eroded” by *Washington v. Glucksberg* (1997) which held that only fundamental rights which are “‘deeply rooted in this Nation’s history and tradition’” qualify for anything other than rational basis scrutiny under the doctrine of “substantive due process.” *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation’s tradition. * * * *

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in *Casey*. It has thereby exposed *Casey’s* extraordinary deference to precedent for the result-oriented expedient that it is.

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 liberty protected by the Constitution allows homosexual persons the right to make this choice”); (“‘These matters . . . are central to the liberty protected by the Fourteenth Amendment’”); (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”). The Fourteenth Amendment expressly allows States to deprive their citizens of “liberty,” so long as “due process of law” is provided:

“No state shall . . . deprive any person of life, liberty, or property, *without due process of law*.”

Amdt. 14 (emphasis added).

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*. 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. Noting that "[p]roscriptions against that conduct have ancient roots," that "[s]odomy 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," and that many States had retained their bans on sodomy, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition.'"

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. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers*' conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. The Court points to *Griswold v. Connecticut* (1965). But that case expressly disclaimed any reliance on the doctrine of "substantive due process," and grounded the so-called "right to privacy" in penumbras of constitutional provisions other than the Due Process Clause. * * * *

Roe v. Wade recognized that the right to abort an unborn child was a "fundamental right" protected by the Due Process Clause. The *Roe* Court, however, made no attempt to establish that this right was "'deeply rooted in this Nation's history and tradition'"; instead, it based its conclusion that "the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" on its own normative judgment that anti-abortion laws were undesirable. * * * *

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." 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.

* * * * *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*." (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,'" the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code."

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. * * * * The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida* (2002) (Thomas, J., concurring in denial of certiorari).

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" (emphasis added). 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 (opinion concurring in judgment), 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.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia* (1967) similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the partner was concerned. In Loving, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis* (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable." This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage. * * * *

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

* * *

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. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer*.

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, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H.R. 5452, 94th Cong., 1st Sess. (1975); 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. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that 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). At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? 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."

Check Your Understanding

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Notes

1. Be prepared to discuss the role of stare decisis in *Lawrence v. Texas*.

2. Be prepared to articulate the *Glucksberg* test for unenumerated constitutional rights and compare it to the test for incorporation of enumerated rights.

3. Do you think that the umbrella term of "privacy" is useful to protect the rights asserted in these cases? Are there better terms that might be more useful? Why?

4. A pivotal case for *Lawrence* as well as for the following case of *Whole Woman's Health* is *Planned Parenthood of Northeastern Pennsylvania v. Casey* (1992), which the following note elaborates.

Note: Casey

From *Roe v. Wade* in 1973 until *Whole Woman's Health* in 2016, the Court considered a number of abortion cases including reassessments of *Roe v. Wade*, specific requirements and procedures, public funding of abortion and reproductive health, as well as regulation of abortion protest and statements by providers under the First Amendment. One of the most important of these is ***Planned Parenthood of Northeastern Pennsylvania v. Casey***, 505 U.S. 833 (1992), discussed extensively in *Whole Woman's Health*. In *Casey*, a plurality of the Court articulated the "undue burden" standard:

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. * * * * Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional.

The plurality also summarized its principles:

(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.

It applied these principles to several provisions of the Pennsylvania statute, upholding the 24 hour "waiting period" but found the husband-notification provision unconstitutional.

It also reaffirmed the complex doctrine regarding minors and abortion.

Note: Minors and Abortion

The issue of minors and abortions could be considered to be a question of a conflict of constitutional due process rights. On the one hand, although minors generally have less constitutional rights than adults, a minor does have substantive due process rights including a right to reproductive health care including abortion. On the other hand, the substantive due process right of parents to "care, custody, and control" of their children is implicated.

State statutes that require a minor to seek parental consent or to require parental notification before accessing abortion have come before the Court numerous times. The Court has struggled to develop doctrine that accommodates the constitutional interests of both minors and parents, resulting in what is often known as the *Bellotti* standard, after *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979).

Essentially, the doctrine is this:

If a state chooses to require parental consent or notification (which the Court has said are the same regarding minors), the state must also allow the minor to "bypass" this requirement through a judicial process.

This judicial process, which must protect the minor's anonymity and be expeditious, must allow the minor to prove either

• she is sufficiently mature to make the decision without her parents,

or

• she is not sufficiently mature, but the abortion is in her best interest.

Whole Woman's Health v. Hellerstedt

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Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan JJ., joined. Ginsburg, J., filed a concurring opinion. Thomas, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Roberts, C.J., and Thomas, J., joined.

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." (Emphasis added.) 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."

Tex. Health & Safety Code Ann. § 171.0031(a) (West Cum. Supp. 2015).

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital." 38 Tex. Reg. 6546 (2013).

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."

Tex. Health & Safety Code Ann. § 245.010(a).

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, *Casey* (plurality opinion), and each violates the Federal Constitution. Amdt. 14, § 1.

I

A

In July 2013, the Texas Legislature enacted House Bill 2 (H.B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect.

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would "'screen out' untrained or incompetent abortion providers." (*Abbott*). The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

B

On April 6, one week after the Fifth Circuit's decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently 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.

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." *e.g.*, colonoscopies, vasectomy and endometrial biopsy, plastic surgery.

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. "[T]here are 433 licensed ambulatory surgical centers in Texas," of which "336 … are apparently either 'grandfathered' or enjo[y] the benefit of a waiver of some or all" of the surgical-center "requirements."

15. 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." On August 29, 2014, the court enjoined the enforcement of the two provisions.

C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

• The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief.

• Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim.

• In any event, a state law "regulating previability abortion 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."

• "[B]oth the admitting privileges requirement and" the surgical-center requirement "were rationally related to a legitimate state interest," namely, "rais[ing] the standard and quality of care for women seeking abortions and … protect[ing] the health and welfare of women seeking abortions."

• The "[p]laintiffs" failed "to proffer competent evidence contradicting the legislature's statement of a legitimate purpose."

• "[T]he district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit … in the name of the undue burden inquiry."

• Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions "imposes an undue burden on a large fraction of women."

• The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs' expert witnesses (Dr. Grossman) that abortion providers in Texas "'will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all' " of the clinics failing to meet the surgical-center requirement " 'are forced to close.'" But Dr. Grossman's opinion is (in the Court of Appeals' view) "'*ipse dixit*' "; the " 'record lacks any actual evidence regarding the current or future capacity of the eight clinics' "; and there is no "evidence in the record that" the providers that currently meet the surgical-center requirement "are operating at full capacity or that they cannot increase capacity."

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H.B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges. * * * *

{The Court held that there was no claim preclusion}.

III

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." *Roe v. Wade* (1973). 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." *Casey* (plurality opinion). 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." (citing *Gonzales v. Carhart* (2007)).

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. See (opinion of the Court) (performing this balancing with respect to a spousal notification provision); (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (same balancing with respect to a parental notification provision). 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. *See, e.g., Williamson v. Lee Optical of Okla., Inc.* (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

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. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some of the legislative findings. In these circumstances, we said, "[u]ncritical deference to Congress' factual findings . . . is inappropriate."

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). 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. Before the enactment of H.B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." Tex. Admin. Code, tit. 25, § 139.56 (2009) (emphasis added). The new law changed this requirement by requiring 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." Tex. Health & Safety Code Ann. § 171.0031(a). The District Court held that the legislative change imposed an "undue burden" on a woman's right to have an abortion. We conclude that there is adequate legal and factual support for the District Court's conclusion.

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.

The evidence upon which the court based this conclusion included, among other things:

• A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%.

• Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200).

• Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion).

• Expert testimony stating that "it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization" and "in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital."

• Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot.

• Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as "abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility."

• Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home.

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health.

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. See Tr. of Oral Arg. 47. 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. See *Planned Parenthood of Wis., Inc. v. Van Hollen* (W.D.Wis.2015), aff'd *sub nom. Planned Parenthood of Wis., Inc. v. Schimel* (7th Cir. 2015); *Planned Parenthood Southeast, Inc. v. Strange*, (M.D.Ala.2014).

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." *Casey* (plurality opinion). 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. *Cf.* Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is "unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face"). 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." Brief for Society of Hospital Medicine et al. as *Amici Curiae*. Returning to the District Court record, we note that, in direct testimony, the president of Nova Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital." 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.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures. See Brief for Medical Staff Professionals as *Amici Curiae* (listing, for example, requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors); see also Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* (ACOG Brief) ("[S]ome academic hospitals will only allow medical staff membership for clinicians who also … accept faculty appointments"). Again, returning to the District Court record, we note that Dr. Lynn of the McAllen clinic, a veteran obstetrics and gynecology doctor who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic. He was refused admitting privileges at a nearby hospital for reasons, as the hospital wrote, "not based on clinical competence considerations." The admitting-privileges requirement does not serve any relevant credentialing function.

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. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county … more than 150 miles from a provider increased from approximately 86,000 to 400,000 … and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." See *Casey* (joint opinion of O'Connor, Kennedy, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. *Casey* (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, may not have imposed an undue burden is this: Although "H.B. 2 caused the closure of *some* clinics," *post*, at 2343 (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H.B. 2). But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. The District Court credited that evidence and concluded from it that H.B. 2 in fact led to the clinic closures. The dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H.B. 2's requirements would be that they might "force unsafe facilities to shut down." To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He "staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised" and had "[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong." Gosnell's behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell's deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. The

record contains nothing to suggest that H.B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

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. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements; a quality assurance program; personnel policies and staffing requirements; physical and environmental requirements; infection control standards; disclosure requirements; patient-rights standards; and medical- and clinical-services standards, including anesthesia standards. These requirements are policed by random and announced inspections, at least annually, as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations.

H.B. 2 added the requirement that an "abortion facility" meet the "minimum standards … for ambulatory surgical centers" under Texas law. The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least "an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed," as well as "a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility" for facilities that provide moderate sedation, such as most abortion facilities. Facilities must include a full surgical suite with an operating room that has "a clear floor area of at least 240 square feet" in which "[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet." There must be a preoperative patient holding room and a postoperative recovery suite. The former "shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite," and the latter "shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge." Surgical centers must meet numerous other spatial requirements, including specific corridor widths. Surgical centers must also have an advanced heating, ventilation, and air conditioning system, and must satisfy particular piping system and plumbing requirements. Dozens of other sections list additional requirements that apply to surgical centers.

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 record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). Nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. See ACOG Brief (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found."

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile. Nor do provisions designed to safeguard heavily sedated patients (unable to help themselves) during fire emergencies, provide any help to abortion patients, as abortion facilities do not use general anesthesia or deep sedation. Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, surgical-center standards will not help in those instances either.

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."

The Court of Appeals held that this finding was "clearly erroneous." It wrote that the finding rested upon the "'*ipse dixit*'" of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i.e.*, the seven or eight) are operating at full capacity or could not increase capacity. Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court's finding.

For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from " '14,000 abortions annually' " to " '60,000 to 70,000' "—an increase by a factor of about five. The District Court credited Dr. Grossman as an expert witness. The Federal Rules of Evidence state that an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Rule 702. In this case Dr. Grossman's opinion rested upon his participation, along with other university researchers, in research that tracked "the number of open facilities providing abortion care in the state by … requesting information from the Texas Department of State Health Services … [, t]hrough interviews with clinic staff[,] and review of publicly available information." The District Court acted within its legal authority in determining that Dr. Grossman's testimony was admissible. * * * *

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here.

The dissent now seeks to discredit Dr. Grossman by pointing out that a preliminary prediction he made in his testimony in *Abbott* about the effect of the admitting-privileges requirement on capacity was not borne out after that provision went into effect. If every expert who overestimated or underestimated any figure could not be credited, courts would struggle to find expert assistance.

Moreover, making a hypothesis—and then attempting to verify that hypothesis with further studies, as Dr. Grossman did—is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it ({the District Court declined} to credit Texas' expert witnesses, in part because Vincent Rue, a nonphysician consultant for Texas, had exercised "considerable editorial and discretionary control over the contents of the experts' reports").

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence rebutting that issue to the District Court. Texas admitted that it presented no such evidence. Tr. of Oral Arg. 46. Instead, Texas argued before this Court that one new clinic now serves 9,000 women annually. In addition to being outside the record, that example is not representative. The clinic to which Texas referred apparently cost $26 million to construct—a fact that even more clearly demonstrates that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access. See *Planned Parenthood Debuts New Building: Its $26 Million Center in Houston is Largest of Its Kind in U.S.*,Houston Chronicle, May 21, 2010, p. B1.

Attempting to provide the evidence that Texas did not, the dissent points to an exhibit submitted in *Abbott* showing that three Texas surgical centers, two in Dallas as well as the $26–million facility in Houston, are each capable of serving an average of 7,000 patients per year. That "average" is misleading. In addition to including the Houston clinic, which does not represent most facilities, it is underinclusive. It ignores the evidence as to the Whole Woman's Health surgical-center facility in San Antonio, the capacity of which is described as "severely limited." The exhibit does nothing to rebut the commonsense inference that the dramatic decline in the number of available facilities will cause a shortfall in capacity should H.B. 2 go into effect. And facilities that were still operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand. See App. 238; Tr. of Oral Arg. 30–31; Brief for National Abortion Federation et al. as *Amici Curiae* 17–20 (citing clinics' experiences since the admitting-privileges requirement went into effect of 3–week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside).

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from $1 million per facility (for facilities with adequate space) to $3 million per facility (where additional land must be purchased). This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so.

VI

We consider three additional arguments that Texas makes and deem none persuasive.

First, Texas argues that facial invalidation of both challenged provisions is precluded by H.B. 2's severability clause. * * * * {But} The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof. The severability clause refers to severing applications of words and phrases in the Act, such as the surgical-center requirement as a whole. * * * *

Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads *Casey* to have required. But *Casey* used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is *relevant*," a class narrower than "all women," "pregnant women," or even "the class of *women seeking abortions* identified by the State." (opinion of the

Court) (emphasis added). Here, as in *Casey*, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction."

Third, Texas looks for support to *Simopoulos v. Virginia* (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester abortions. This case, however, unlike *Simopoulos*, involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. * * * *

For these reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Ginsburg, concurring

* * * * When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae*. 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 {omitted}.

Justice Alito, with whom The Chief Justice and Justice Thomas join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here * * * * and will undermine public confidence in the Court as a fair and neutral arbiter. * * * *

I – II

{discussions of claim preclusion omitted}

III

Even if res judicata did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, *e.g., Williamson v. Lee Optical of Okla., Inc.* (1955). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve.

Thus, what matters for present purposes is not the effect of the H.B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. *Gonzales v. Carhart* (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a "large fraction" of Texas women of reproductive age. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a "large fraction" of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H.B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H.B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. * * * *

I therefore respectfully dissent.

Check Your Understanding

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Further Your Understanding

CALI Lesson: Abortion CALI, The Center for Assisted Legal Instruction, has a lesson designed to assist and further your understanding of the complicated doctrine regarding abortion. The lesson includes material and questions on *Roe v. Wade;* challenges to *Roe v. Wade* , including *Casey* and the introduction of the "undue burden standard;" *Whole Woman's Health v. Hellerstedt* , and m inors' access to abortion, including parental notification and consent provisions.

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1.13: CHAPTER ELEVEN- Liberty, Due Process, and Equal Protection

I. Equal Protection and “Privacy”

Skinner v. State of Oklahoma, ex. rel. Williamson
316 U.S. 535 (1942)

Justice Douglas for the Court, joined by Roberts, Black, Reed, Frankfurter, Murphy, Byrnes, J.J. Concurring opinion by Chief Justice Stone. Concurring opinion by Justice Jackson.

Mr. 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. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari.

The statute involved is Oklahoma’s Habitual Criminal Sterilization Act. Okl.St.Ann. Tit. 57, § 171, et seq. 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. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. Notice, an opportunity to be heard, and the right to a jury trial are provided. The issues triable in such a proceeding are narrow and confined. If the court or jury finds that the defendant is an ‘habitual criminal’ and that he ‘may be rendered sexually sterile without detriment to his or her general health’, then the court ‘shall render judgment to the effect that said defendant be rendered sexually sterile’ by the operation of vasectomy in case of a male and of salpingectomy in case of a female. Only one other provision of the Act is material here and that is § 195 which provides that ‘offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.’

Petitioner was convicted 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 fire arms 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.

Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise of the police power in view of the state of scientific authorities respecting inheritability of criminal traits. It is argued that due process is lacking because under this Act, unlike the act upheld in *Buck v. Bell* (1927), the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative of the Fourteenth Amendment. We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma grand larceny is a felony. Larceny is grand larceny when the property taken exceeds $20 in value. Embezzlement is punishable ‘in the manner prescribed for feloniously stealing property of the value of that embezzled.’ Hence he who embezzles property worth more than $20 is guilty of a felony. A clerk who appropriates over $20 from his employer’s till and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. * * * * Whether a particular act is larceny by fraud or

embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose-a question for the jury under appropriate instructions.

It was stated in *Buck v. Bell* that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is 'the usual last resort of constitutional arguments.' Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry'. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co. v. Pinson* (1931) stated, 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing 'degrees of evil' * * * * {and}that 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining 'its restrictions to those classes of cases where the need is deemed to be clearest'. * * * * But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. 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. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo v. Hopkins* (1886). When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins*; *Gaines v. Canada* (1938). 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. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, 'with reference to the time when the fraudulent intent to convert the property to the taker's own use' arises. 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.

In *Buck v. Bell*, the Virginia statute was upheld though it applied only to feebleminded persons in institutions of the State. But it was pointed out that 'so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.' Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a 'trespass' based on distinctions which are 'very largely dependent upon history for explanation' (Holmes, The Common Law, p. 73) could readily become a rule of human genetics.

It is true that the Act has a broad severability clause. But we will not endeavor to determine whether its application would solve the equal protection difficulty. The Supreme Court of Oklahoma sustained the Act without reference to the severability clause. We have therefore a situation where the Act as construed and applied to petitioner is allowed to perpetuate the discrimination which we have found to be fatal. Whether the severability clause would be so applied as to remove this particular constitutional objection is a question which may be more appropriately left for adjudication by the Oklahoma court. That is reemphasized here by our uncertainty as to what excision, if any, would be made as a matter of Oklahoma law. It is by no means clear whether if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other the class of criminals who might be sterilized.

Reversed.

Mr. 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.

Moreover, if we must presume that the legislature knows-what science has been unable to ascertain-that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. 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.

* * * * And so, while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

Mr. Justice Jackson, concurring.

I join the Chief Justice in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of Mr. Justice Douglas that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other.

Perhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the Chief Justice. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined. Since this Act does not present these questions, I reserve judgment on them.

I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. *Buck v. Bell* (1927).

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority-even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.

Eisenstadt v. Baird

405 U.S. 438 (1972)

Brennan, J., delivered the opinion of the Court, in which Douglas, Stewart, and Marshall, JJ., joined. Douglas, J., filed a concurring opinion. White, J., filed an opinion concurring in the result, in which Blackmun, J., joined. Burger, C. J., filed a dissenting opinion. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

Mr. 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., c. 272, 21, 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. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it

violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. (1971). We affirm.

Massachusetts General Laws Ann., c. 272, 21, 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. This construction of state law is, of course, binding on us.

The legislative purposes that the statute is meant to serve are not altogether clear. In *Commonwealth v. Baird*, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "[T]he prohibition in 21," the court declared, "is directly related to" the State's goal of "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." In a subsequent decision, *Sturgis v. Attorney General* (1970), the court, however, found "a second and more compelling ground for upholding the statute" – namely, to protect morals through "regulating the private sexual lives of single persons." The Court of Appeals, for reasons that will appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself – a purpose that the court held conflicted "with fundamental human rights" under *Griswold v. Connecticut* (1965), where this Court struck down Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

I

We address at the outset appellant's contention that Baird does not have standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under 21A nor a single person unable to obtain contraceptives. * * * * For the foregoing reasons we hold that Baird, who is now in a position, and plainly has an adequate incentive, to assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

II

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As the Chief Justice only recently explained in *Reed v. Reed* (1971):

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Railway Express Agency v. New York* (1949). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

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 General Laws Ann., c. 272, 21 and 21A. For the reasons that follow, we conclude that no such ground exists.

First. Section 21 stems from Mass. Stat. 1879, c. 159, 1, 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." Although the State clearly abandoned that purpose with the enactment of 21A, at least insofar as the illicit sexual activities of married persons are concerned, the court reiterated in *Sturgis v. Attorney General*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," *Williamson v. Lee Optical Co.* (1955), we 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., c. 272, 18. 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. What Mr. Justice Goldberg said in *Griswold v. Connecticut*, (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. "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." Like Connecticut's laws, 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, 21 and 21A on their face have a dubious relation to the State's criminal prohibition on fornication. As the Court of Appeals explained, "Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply gives away a contraceptive to 20 times the 90-day sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the de minimis effect of 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

Second. Section 21A was added to the Massachusetts General Laws by Stat. 1966, c. 265, 1. The Supreme Judicial Court in Commonwealth v. Baird held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of 21A. As the Court of Appeals remarked, "Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Nor did the Court of Appeals "believe that the legislature [in enacting 21A] suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the Griswold ruling."

Again, we must agree with the Court of Appeals. If health were the rationale of 21A, the statute would be both discriminatory and overbroad. * * * * We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

Third. 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? The Court of Appeals analysis "led inevitably to the conclusion that, so far as

morals are concerned, it is contraceptives per se that are considered immoral – to the extent that Griswold will permit such a declaration." * * * *

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to 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. *See Stanley v. Georgia* (1969). *See also Skinner v. Oklahoma* (1942); *Jacobson v. Massachusetts* (1905).

On the other hand, if 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. Mr. Justice Jackson, concurring in *Railway Express Agency v. New York* (1949), made the point:

"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."

Although Mr. Justice Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann., c. 272, 21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is

Affirmed.

{Justice Douglas, concurring, would resolve the issue on First Amendment grounds.

Justice White, joined by Justice Blackmun, concurring would resolve the issue under Griswold with no need to reach the unmarried issue.

Chief Justice Burger, dissenting, would uphold the statute as regulating non-medical persons.}

Check Your Understanding

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Notes

1. Be prepared to articulate how equal protection operates differently in *Skinner* and *Eisenstadt* in relation to substantive due process precedent. Both *Skinner* and *Eisenstadt* are often incorrectly recalled as substantive due process cases and often cited in lists of substantive due process cases regarding fundamental rights, but both rest squarely on equal protection doctrine.

2. In *Buck v. Bell*, 274 U.S. 200 (1927), the Court upheld the sterilization of Carrie Buck, described as a "feeble minded white woman who was committed to the State Colony" and "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 under a statute of Virginia, * * * * providing that "the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives." In the opinion, Justice Holmes (in)famously declared "three generations of imbeciles are enough."

Subsequent research revealed that Carrie Buck was of normal intelligence and that her "illegitimate child" was the result of a rape, and that her mother had been institutionalized for "promiscuity and prostitution."

While widely discredited, *Buck v. Bell* has not been explicitly overruled.

3. Be prepared to discuss the last sentence of Justice Douglas's opinion in *Skinner*: "It is by no means clear whether if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other the class of criminals who might be sterilized."

4. Note that in Chief Justice Stone's concurring opinion in *Skinner*, he is referring to procedural due process (notice and an opportunity to be heard).

5. Footnote 10 of the Court's opinion in *Eisenstadt* quotes *Stanley v. Georgia*, 394 U.S. 557 (1969) regarding privacy:

"[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.' *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Note that *Stanley v. Georgia* is a First Amendment case in which the Court found the possession of obscenity in one's home is protected under the First Amendment. Recall that *Stanley* was also precedent relied upon by the challengers to the Georgia sodomy statute in *Bowers v. Harwick*. Also note that *Olmstead*, quoted in the *Stanley v. Georgia* discussion in footnote 10 of *Eisenstadt* is a Fourth Amendment case. Thus, the notion of "privacy" extends across constitutional provisions. *Stanley* is sometimes said to rest on the perspective that a "man's home is his castle." Consider whether there are limits to that perspective of privacy.

II. Same-Sex Marriage

United States v. Windsor

570 U.S. ___ (2013)

Kennedy, j., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, Jj., joined. Roberts, C.J., filed a dissenting opinion. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, and in which Roberts, C.J., joined as to Part I. Alito, J., filed a dissenting opinion, in which Thomas, J., joined as to Parts II and III.

Justice Kennedy delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of "marriage" and "spouse." Section 3 of DOMA provides as follows:

"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.”

1 U. S.C. § 7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s § 3. * * * *

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG.

* * * * On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. * * * *

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here. * * * * {The Court decided it should proceed to the merits.}

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all

other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at N. Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. * * * * {for example, in immigration.} Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

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, *see, e.g., Loving v. Virginia* (1967); 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."

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. * * * *Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. * * * * In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. * * * *

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. 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.'" *Romer v. Evans* (1996).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. * * * *

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas* (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

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. See U. S. Const., Amdt. 5; *Bolling v. Sharpe* (1954). 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. *Department of Agriculture v. Moreno* (1973). 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 responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. 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." H. R. Rep. No. 104–664, pp. 12–13 (1996). 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 arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." 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.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, *see Lawrence*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the 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.

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. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the

Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries.

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," with the intent to influence or retaliate against that official. Although a "spouse" qualifies as a member of the officer's "immediate family," DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * * * The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

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.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling v. Sharpe; Adarand Constructors, Inc. v. Peña* (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is *affirmed*.

Chief Justice Roberts, dissenting.

* * * * 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.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage. * * * *

Justice Scalia, with whom Justice Thomas joins, and with whom The Chief Justice joins as to Part I, dissenting.

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.

I

{standing discussion omitted}

II

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of "the usual tradition of recognizing and accepting state definitions of marriage" continue. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe* (1954), *Department of Agriculture v. Moreno* (1973), and *Romer v. Evans* (1996)—all of which are equal-protection cases. And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence v. Texas* (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, *compare* Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24–28 (no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36 (yes); and compare 699 F. 3d 169, 180–185 (CA2 2012) (yes), with id., at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States v. Virginia* (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court

certainly does not *apply* anything that resembles that deferential framework. See *Heller v. Doe* (1993) (a classification " 'must be upheld . . . if there is any reasonably conceivable state of facts' " that could justify it).

The majority opinion need not get into the strict- vs.- rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," that it violates "basic due process" principles, and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment." The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg* (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "'ordered liberty.'" Id. (quoting *Palko v. Connecticut* (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a " 'bare . . . desire to harm' " couples in same-sex marriages. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas* (2003) (Scalia, J., dissenting). 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. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien* (1968) {a First Amendment case}. Or at least it was a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them * * * *

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence*. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects,"—with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with The Chief Justice's view (dissenting opinion), that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by " 'bare . . . desire to harm' " couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion:

"DOMA's *This state law's* principal effect is to identify a subset of state-sanctioned marriages*constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA*this state law* contrives to deprive some couples married under the laws of their State*enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage:

"[DOMA]*This state law* tells those couples, and all the world, that their otherwise valid marriages *relationships* are unworthy of federal*state* recognition. This places same-sex couples in an unstable position of being in a second-tier marriage*relationship.* The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, ..."

Or this—which does not even require alteration, except as to the invented number:

"And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the 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."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule ourselves. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012), are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012). Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting "the State of Maine to issue

marriage licenses to same-sex couples") (approved by a popular vote, 53% to 47%, on November 6, 2012) with Maine Question 1 (rejecting "the new law that lets same-sex couples marry") (approved by a popular vote, 53% to 47%, on November 3, 2009).

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, with whom Justice Thomas joins as to Parts II and III, dissenting {omitted}.

Check Your Understanding

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Obergefell v. Hodges

576 U.S. ___ (2015)

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C.J., filed a dissenting opinion, in which and Thomas, J., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

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. See, *e.g.*, Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

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.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners’ contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners’ cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems “hurtful for the rest of time.” He brought suit to be shown as the surviving spouse on Arthur’s death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation (2000); S. Coontz, Marriage, A History (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. * * * * In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick* (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans* (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife."

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. After that ruling, some additional

States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B. Two Terms ago, in *United States* v. *Windsor* (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community."

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.

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. See, *e.g.*, *Eisenstadt* v. *Baird*, (1972); *Griswold* v. *Connecticut* (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe* v. *Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. 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. See, *e.g.*, *M. L. B.* v. *S. L. J.* (1996); *Cleveland Bd. of Ed.* v. *LaFleur*, (1974); *Griswold*; *Skinner* v. *Oklahoma* (1942); *Meyer* v. *Nebraska* (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*, *Lawrence*; *Turner*; *Zablocki*; *Loving*; *Griswold*. And in assessing

whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt*; *Poe* (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See also *Zablocki* (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge v. Department of Public Health* (Ma. 2003).

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. *Cf. Loving* ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters* (1925); *Meyer*. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, (quoting *Meyer*). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae*.

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. See *Windsor*.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs.

Democracy in America {originally published in France in two volumes, 1835; 1840}.

In *Maynard* v. *Hill* (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae*; Brief for American Bar Association as *Amicus Curiae*. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg* (1997), which called for a "careful description" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause

must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving*; *Lawrence*.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based

inequality on marriage. * * * * Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.* (1996), the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g.*, *Zablocki*; *Skinner*. These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life —state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law. Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette* v. *BAMN* (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal

stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette* (1943). {First Amendment case regarding compulsory flag salute in schools}. This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers v. Hardwick*, a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams* v. *North Carolina* (1942). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78 (A. Hamilton).

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." *Id.* (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. * * * *

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. * * * *

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. * * * *

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson* (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of

the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. {The Sixth Circuit rejected their claims} and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification.

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg* (1997); see Kennedy, *Unenumerated Rights and the Dictates of Judicial Restraint* (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford* (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." In *Lochner* itself, the Court struck down a New York law setting maximum hours

for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law."

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights (1958). Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical* (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*.

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach.

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few "guideposts for responsible decisionmaking in this unchartered area," "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula." Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold v. Connecticut* (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley* (1987); *Zablocki v. Redhail* (1978); *Loving v. Virginia* (1967). These cases do not hold, of course, that anyone who wants to get

married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman of the same race." Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners."

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt v. Baird* (1972); see *Olmstead v. United States* (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas* (2003) which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home."

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman* (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs*. (1989); *San Antonio Independent School Dist. v. Rodriguez* (1973). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*. The majority opens its opinion by announcing petitioners' right to "define and express their identity." The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner* (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 Emory L. J. 1977 (2015).

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.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." This argument again echoes *Lochner*,

which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act."

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." As petitioners put it, "times can blind." But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." The majority's approach today is different:

"Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right."

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence* (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White* (2002) (Kennedy, J., concurring) {First Amendment case}. That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social

change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." *Rehnquist, The Notion of a Living Constitution*, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN* (2014).

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." (Scalia, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." *Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985). 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. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "exercise" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Scalia, J., dissenting (in which Thomas, J., joined).

I join The Chief Justice's opinion in full. I write separately to call attention to this Court's threat to American democracy. * * * *

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. * * * *

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.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

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. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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.

* * * *

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.

* * * *

Check Your Understanding

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Notes

1. Be prepared to articulate the due process, equal protection, and "synergy" arguments possible after *Windsor* and *Obergefell*.

2. Justice Scalia's dissent in *Windsor* was used by some judges as a template in deciding challenges to same-sex marriage supporting the conclusion that the same-sex marriage ban was unconstitutional. See Ruthann Robson, *Justice Scalia's Petard and Same-Sex Marriage,* 17 CUNY L. REV. F. 72 (2014).

3. Note that a companion case to *United States v. Windsor* was *Hollingsworth v. Perry*, f/k/a *Perry v. Schwarzenegger*, complex litigation involving the constitutionality of California's Proposition 8 which amended the California state constitution to prohibit same-sex marriage, after the California Supreme Court had found a constitutional right to same-sex marriage. The United States Supreme Court found it did not have the power to decide *Perry* because there was no case or controversy: California did not defend Proposition 8 even at trial and the "intervenors" proved problematical. Like *Windsor*, the government responsible for the enactment chose not to defend the constitutionality, but the Court in *Windsor* found BLAG had sufficient stake in the controversy.

4. Justice Kennedy, who wrote the Court's opinion in *Windsor* and *Obergefell*, retired from the Court in 2018, replaced by Justice Brett Kavanaugh who was confirmed after a contentious process. Justice Ginsburg, who joined the 5-4 majorities in *Windsor* and *Obergefell*, died in September 2020, and was replaced by Justice Amy Coney Barrett, who was confirmed by the Senate a month later by a slim majority, two weeks before the Presidential election. Many commentators believe that *Obergefell* opinion may be limited or even overruled by the newly composed Court.

Further Your Understanding

CALI Lesson:Marriage and Same-Sex Marriage in Constitutional Law

CALI, The Center for Assisted Legal Instruction, has a lesson designed to further your understanding of the constitutional issues, doctrine, and theories regarding the same-sex marriage cases, other marriage cases considered by the United States Supreme Court, and possible application to future controversies.

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1.14: CHAPTER TWELVE- State Constitutions

I. General Principles

Every state in the United States has its own state constitution that, like the United States Constitution, structures its government and contains provisions relating to individual rights.

Generally speaking, state constitutions can provide greater individual rights than the federal constitution. The metaphor often used is that while the federal constitution provides the floor, state constitutions can provide the ceiling.

When considering the ability of state constitutions to grant greater rights and employing the floor/ceiling metaphor, there are three important caveats grounded in the Supremacy Clause, Article VI.

First, the "ceiling" of the state constitutional right cannot infringe on a right guaranteed by the federal constitution. For example, if a state constitutional provision was interpreted to protect sexual minorities under a strict scrutiny standard, a person could challenge that protection based on a denial of their own equal protection rights or under a different constitutional right such as the First Amendment's protection of free exercise of religion. Further, recall that a state constitutional provision itself can violate the United States Constitution, *Romer v. Evans* (1996).

Second, the "ceiling" of the state constitutional right applies only to infringements by the state and its subdivisions. In other words, a federal statute cannot infringe a state constitutional right.

Third, the state courts are ultimate arbiters of their state constitutional rights, but a decision granting greater rights as a matter of state constitutional law must make it clear that the state constitutional provision is an "independent" ground of the decision. There can be confusion if a state court cites both state constitutional cases and United States Supreme Court cases on a specific doctrine. If the state court makes it clear and unambiguous that it is resting its decision on the state grounds (and only using the Supreme Court cases as persuasive or illustrative), then the United States Supreme Court cannot review the state court's decision.

Each state constitution is different. The text of state constitutional provisions relating to rights can be compared to the United States Constitution's provisions in three ways:

- First, the text can be exactly the same. For example, many states have an equal protection clause and a due process clause for example. Even if the language is exactly the same, the state courts can interpret the meaning of the state clause to be more expansive than the federal, assuming the state courts make it clear that they are relying on their state constitution.
- Second, the text can be somewhat similar or analogous. For example, some states have enumerated the classifications protected in the equal protection clause and have included "sex." (This can be known as a state-Equal Rights Amendment, or "little ERA"). State courts then most likely subject sex classifications to a version of strict scrutiny rather than intermediate scrutiny.
- Third, the text can be unique. For example, some states include a protection for "privacy" in their constitution or provide for public education to be widely available.

Again, no matter whether the state constitutional provision is the same, similar, or unique, the state courts can interpret the provision to grant greater rights than would be available under the United States Constitution, subject to the Supremacy Clause caveats.

Additionally, although the United States Constitution, with the exception of the Thirteenth Amendment, requires a threshold of "state action," a state constitution can reach private action. For example, a 1970 amendment to the Illinois Constitution provides:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property. These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

Art. I § 17, Illinois Constitution.

The following sections provide examples.

Education

In *Edgewood Independent Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Supreme Court of Texas confronted the similar inequities that the United States Supreme Court found could not be constitutionally remedied in *San Antonio Independent School District v. Rodriguez* (1973). After discussing the financing disparities, the Texas Supreme Court linked spending to quality of education:

The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student. High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators.

The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offers virtually no extra-curricular activities such as band, debate, or football. At the time of trial, one-third of Texas school districts did not even meet the state-mandated standards for maximum class size. The great majority of these are low-wealth districts. In many instances, wealthy and poor districts are found contiguous to one another within the same county.

The challenge was based on three Texas state constitutional provisions:

- Texas Constitution's equal rights guarantee of article I, section 3 {"All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."};
- Texas Constitution's due course of law guarantee of article I, section 19 {"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."}; and
- Texas Constitution's "efficiency" mandate of article VII, section 1 regarding public schools {"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."}

The court concluded that the disparities in financing violated the "efficiency" mandate of article VII, § 1. The court noted that the Texas constitution

requires an "efficient," not an "economical," "inexpensive," or "cheap" system. The language of the Constitution must be presumed to have been carefully selected. The framers used the term "economical" elsewhere and could have done so here had they so intended.

It continued that considering "the general spirit of the times and the prevailing sentiments of the people," it is apparent "from the historical record that those who drafted and ratified article VII, section 1 never contemplated the possibility that such gross inequalities could exist within an "efficient" system." Further, the court stated that "clearly that the purpose of an efficient system was to provide for a '*general* diffusion of knowledge.'"

The court acknowledged that courts in nine other states with similar school financing systems have ruled those systems to be unconstitutional for varying reasons, usually under their state constitutions. The court directed the legislature to take immediate action to remedy the constitutional defect.

Disability

In *Daly v. DelPonte*, 624 A.2d 876 (Conn. 1993), the Connecticut Supreme Court considered a challenge under the Connecticut Constitution, Article XXI, adopted by voter referendum in 1984, which added "physical or mental disability" to its equal protection clause: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or

mental disability." ("sex" had been added in 1974). Edward Daly, who suffered from seizures, challenged a Commission of Motor Vehicles suspension of his driver's license and specific conditions regarding submitting medical reports every three months. The court applied strict scrutiny, holding that while traffic safety was a compelling governmental interest, the means chosen was not sufficiently narrowly tailored to achieve that interest. The lack of narrow tailoring was based on a lack of considering Daly's specific medical condition.

In *Breen v. Carlsbad Municipal Sch.*, 120 P.3d 413 (N.M. 2005), the New Mexico Supreme Court considered a differential in its state workers compensation scheme which granted compensation for life for total permanent physical disabilities and up to 700 weeks of compensation for permanent partial physical disabilities, yet capped compensation for all primary mental disabilities at 100 weeks. The court considered a challenge pursuant to the New Mexico Constitution which provides, "nor shall any person be denied equal protection of the laws." N.M. Const. art. II, § 18. Thus, it is identical to the Fourteenth Amendment. Nevertheless, the court decided that persons with mental disability should be afforded intermediate scrutiny:

Based on our development of New Mexico's Equal Protection Clause, it is appropriate to apply intermediate scrutiny to classifications based on mental disability because such persons are a sensitive class. The historical discriminatory treatment of persons with mental disabilities shows that the courts should be sensitive to possible discrimination against persons with mental disabilities contained in legislation that purports to treat them differently based solely on the fact that they have a mental disability.

Finally, we are not basing our decision to consider persons with mental disabilities a sensitive class for purposes of equal protection on any notion that such persons cannot advocate for themselves in the political process. To the contrary, persons with mental disabilities and their political allies are active participants in the political process. However, their effective advocacy is seriously hindered by the need to overcome the already deep-rooted prejudice against their integration in society. The gains in societal acceptance and political advocacy made by the disability rights movement today could easily be reversed through discriminatory laws in the future.

The court found that the disparity between the compensation granted to workers who suffer physical injuries and those who suffer mental injuries was not substantially related to the important government interests such as preventing fraud and curtailing costs.

"Sodomy"

As the Court in *Lawrence v. Texas* noted, after *Bowers v. Hardwick*,

The courts of five different States have declined to follow it {*Hardwick*} in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18, 24 (1998); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

For example, the Arkansas constitutional provision in *Jegley* was Art. 2 § 2 entitled "Individual Liberty" which reads:

All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

The Arkansas Supreme Court interpreted this provision as including a "right to privacy," noting that the court has "recognized protection of individual rights greater than the federal floor in a number of cases" and that "Arkansas has a rich and compelling tradition of protecting individual privacy." The court held that there was a fundamental right to privacy meriting strict scrutiny and given that the state conceded there was no compelling governmental interest, the statute criminalizing sodomy was unconstitutional. The court also found the statute, which criminalized only acts between members of the "same sex," violated the state constitution's equal protection provision.

Minors and Abortions

The dynamics between state legislatures, state courts, and state voters can be intense on controversial matters such as minors and abortions. In 1988, the Florida legislature passed a parental consent statute, § 390.001(4)(a), Florida Statutes (Supp. 1988), that provided that prior to undergoing an abortion, a minor must obtain parental consent or, alternatively, must convince a court that she is sufficiently mature to make the decision herself or that, if she is immature, the abortion nevertheless is in her best interests. This statute comported with the Fourteenth Amendment doctrine.

However, in *In re T.W.*, 551 So.2d 1186 (Fla. 1989), the Florida Supreme Court declared this statute unconstitutional under the Florida constitution's "right of privacy." In 1980, pursuant to a voter referendum, Art. 1 § 23 was added to the constitution to provide:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The court quoted a previous decision as stating:

The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

In construing the provision, the court stressed that "every natural person" included minors. The court applied strict scrutiny under the state constitution, essentially determining that a minor did not have lesser constitutional rights than an adult. It invalidated the statute.

The next year the legislature passed § 390.01115, Florida Statutes (1999), the Parental Notice of Abortion Act, which again provided that prior to undergoing an abortion, a minor must notify a parent of her decision or, alternatively, must convince a court that she is sufficiently mature to make the decision herself, or that, if she is immature, the abortion nevertheless is in her best interests.

In *North Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003), the Florida Supreme Court reaffirmed *In re T.W.* and reached the same conclusion, finding the statute unconstitutional.

The Florida Legislature then proposed, and the voters ratified, a constitutional amendment authorizing the Florida Legislature, notwithstanding a minor's right to privacy under Florida law, to require notification to a parent or guardian before termination of a minor's pregnancy. The amendment provides:

The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exception to such requirement for notification and shall create a process for judicial waiver of the notification.

Fla. Const. art. X, § 22.

Thereafter, in 2005, the legislature passed Florida's Parental Notice of Abortion Act § 390.01114, Florida Statutes. The statute provides that actual notice, as defined, of an abortion shall be given to a parent or legal guardian of a minor by a physician at least 48 hours before the abortion. The statute provides exceptions in cases of medical emergency, waiver of notice, or where the minor has been married or has had the disability of nonage removed. It provides procedures for judicial waiver of notice.

Same-Sex Marriage

As the appendices to *Obergefell v. Hodges* attest, there was much litigation before the United States Supreme Court decided the case. A fair amount of this litigation was under state constitutions, although at times this was complicated by state constitutional amendments passed by voter referendum which limited the definition of marriage as "one man and one woman."

Among the earliest cases was *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), in which the Hawai'i Supreme Court construed the specific Hawai'i constitutional provision protecting a right to privacy as not including a fundamental right of persons of the same sex to marry, but construing the state constitution's equal protection clause including sex as mandating strict scrutiny for the same-sex marriage ban. The court remanded the case for trial on strict scrutiny, but the legislature intervened, proposing a voter referendum which passed – – – and which gave only the legislature the power to declare same-sex marriage valid.

In *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court construed the state constitution's "common benefits clause," dating from 1777, which provides:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

The court stated,

The words of the Common Benefits Clause are revealing. While they do not, to be sure, set forth a fully-formed standard of analysis for determining the constitutionality of a given statute, they do express broad principles which usefully inform that analysis. Chief among these is the principle of inclusion. As explained more fully in the discussion that follows, the specific proscription against governmental favoritism toward not only groups or "set[s] of men," but also toward any particular "family" or "single man," underscores the framers' resentment of political preference of any kind. The affirmative right to the "common benefits and protections" of government and the corollary proscription of favoritism in the distribution of public "emoluments and advantages" reflect the framers' overarching objective "not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have *an equal share in the fruits of the common enterprise.*" W. Adams, *The First American Constitutions* 188 (1980) (emphasis added). Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage.

The court eschewed "the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment," in favor of an "inclusionary principle." The court did conclude that the exclusion of same-sex couples from the "common benefits" accorded to marriage did violate this provision but retained jurisdiction to "permit the Legislature to consider and enact legislation consistent with the constitutional mandate." The Vermont legislature ultimately adopted a civil partnership scheme.

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Notes

1. Having come to the end of LEDP, if you were drafting a state constitution, which rights would you include? How specific would you be?

2. If you could amend the United States Constitution in only one way, what would it be?

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1.15: Appendix

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2: Notices

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Notices

Ruthann Robson

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Table of Cases: Chronological

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Table of Cases: Chronological

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