

The American Constitutional Order

The History, Philosophy and Structure of the American Constitution

Individual Rights and the American Constitution

Fourth Edition
2015 Supplement

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INTRODUCTION

This is the 2014-15 Supplement to the Fourth Edition of Kmiec, Presser & Eastman, *The American Constitutional Order* (2014), and two companion volumes, *Individual Rights and the American Constitution* and *The History, Philosophy and Structure of the American Constitution*. The major case from the most recent term was the decision in *Obergefell v. Hodges* finding an implied due process mandate that States redefine the institution of marriage to encompass same-sex relationships. So that instructors and their students need not juggle more than one supplement, this supplement also contains materials covering the Court's work in the term prior to the most recent one – namely, OT 2013. Thus, the coverage of this supplement is from OT 2013 to the present. The Fourth Edition of our main volume was published recently in 2014.

In the final days of the October 2014 term, Chief Justice Roberts mustered a 6–3 majority to save the Affordable Care Act's interlocking health reforms. (*King v. Burwell*, 135 S. Ct. 2480 (2015)). Those lacking enough money to buy insurance would receive a subsidy to acquire it from a so-called exchange. A section of the ACA seemed to confine subsidies to insurance purchases from an “exchange established by the state.” But to the consternation of dissenters, the majority found that the ACA allows for tax credits when purchases are made on federal exchanges as well. To the Chief Justice, the ruling manifested respect for the Congress to make reforms work as likely intended. To Justice Antonin Scalia, legal interpretation with an eye on consequences is “quite absurd.”

The Chief Justice did dissent from Justice Anthony Kennedy's impassioned embrace of same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), however, taking his colleagues to task for displacing the democratic process in the States —35 of which had quite recently, and generally by large margins, reaffirmed the long-standing, biologically-rooted definition of marriage. The loss of opportunity to democratically persuade was lamented in all four of the dissents, and Justice Scalia in particular lambasted the writing of Kennedy as descending from the disciplined reasoning of the legendary Marshall to the “mystical aphorisms of the fortune cookie.”

A number of other important developments bear mention. Justice Kennedy, writing for a slim 5-4 majority, found that claims based merely on disparate impact, rather than intentional discrimination, could be brought under the Fair Housing Act. In dissent, Justice Samuel Alito illustrated how such a ruling perversely discourages even the enforcement of health and safety measures, to the disadvantage of the poor. (*Tex. Dept. of Hous. and Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015)).

The president has the exclusive power to grant formal recognition to a foreign sovereign, according to another Kennedy opinion, invalidating a statute requiring the State Department to list, upon request, “Israel” as the country of birth on passports for a person born in Jerusalem. (*Zivotofsky v. Kerry*,

135 S. Ct. 2076 (2015).) Regarding North Carolina’s oversight of dentists, the Court held that state-action immunity from antitrust liability depends on active state supervision in the regulatory process. (*N.C. Bd. of Dental Exam’r v. FTC*, 135 S. Ct. 1101 (2015)).

A bare 5–4 majority, led this time by Justice Ruth Bader Ginsburg, upheld the people’s initiative to delegate Arizona’s redistricting process to an independent commission, despite the requirement in the Constitution that the “Times, Places and Manner of holding Elections” for federal office are to be determined by “the Legislature” of the State. The word *legislature*, wrote Justice Ginsburg, includes any lawful means authorized by the state to make law. Chief Justice Roberts and Justices Scalia, Thomas, and Alito all dissented, arguing that the history of the 17th Amendment shows that the words “the legislature” could not have included “the people” without another constitutional amendment. (*Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015)).

A local ordinance that identifies various categories of outdoor signs based on the type of information they convey amounts to content-based restriction, and so must satisfy a compelling governmental interest, Justice Clarence Thomas wrote for the unanimous Court, albeit with a number of separate concurrences. (*Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)).

In an 8–1 decision written by Justice Scalia, the Court concluded that Title VII prohibits prospective employers from refusing to hire based on an applicant’s religious practice when that practice can be accommodated without undue hardship. The need for accommodation does not have to be highlighted or specifically requested by the applicant. All that must be shown is that the need for the accommodation was a motivating factor in the employer’s decision. (*EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015)).

The two major cases from the previous term (OT 2013) were *Hobby Lobby, infra.* and *Noel Canning*, dealing with the scope of the President’s recess appointment authority. Beyond the edited copies of the major cases in the supplementary period are summaries of most of the decisions mentioned in this introduction.

In the “big” case, *Burwell v. Hobby Lobby*,¹ Justice Alito for a 5-4 majority found that the Religious Freedom Restoration Act (RFRA) is designed to protect the religious liberty of “persons,” which is statutorily defined to include corporations, and it doesn’t matter whether the individuals are expressing those beliefs as individuals outside or inside a private, closely-held corporation. He further held that mandating that the evangelical Christian owners of Hobby Lobby facilitate access to abortion-inducing contraceptives contrary to the teaching of their church was a substantial burden on their free exercise of religion that, even assuming such a mandate furthered a compelling governmental interest, could not survive strict scrutiny because the government could accomplish its purpose in more narrowly-tailored ways, such as getting those contraceptives into the hands of the employees itself. Justice Alito believes that awarding this exemption will not lead to broader claims of exemption from

¹ *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014).

employment discrimination and other generally-applicable laws unrelated to contraception. The differentiation is more than likely to arise in making the two inquiries under RFRA: is the law a substantial burden? And does the law accomplish a compelling objective in the least burdensome fashion? Exempting Hobby Lobby from dispensing contraceptives is one thing; an excuse to discriminate quite another. So too, the Court should have an easier time differentiating the treatment of publicly traded companies from privately held ones, and the Court says it cannot envision for practical reasons a publicly traded company claim succeeding, although as a logical matter, it is possible to imagine a major, publicly-traded company being organized around a corporate charter that includes certain religious tenets, just as there are already publicly-traded companies that explicitly organize themselves around various claims of “social” or “environmental” justice (think Starbucks, or Ben & Jerry’s Ice Cream).

Back during the George W. Bush administration, Senate Democrats decided not to adjourn for the customary Christmas holiday recess to prevent President Bush from making executive appointments under the Constitution’s Recess Appointments Clause. Instead, they went into “pro forma” sessions, with two members of the Senate (1 Democrat, 1 Republican) who lived close to Washington, D.C. meeting briefly every third day to conduct any necessary business under the Senate’s unanimous consent rules. When the tables were turned and Republicans controlled the Senate and Democrat Barack Obama was in the White House, Republicans likewise went into pro forma sessions. But President Obama made controversial recess appointments anyway, stacking the National Labor Relations Board with aggressively pro-union appointees and filling the vacancy at the head of the Consumer Financial Protection Bureau, an appointment that Republicans had blocked because of concerns that the agency had been unconstitutionally delegated too much unfettered power. The recess appointments decision² included here resulted from a lawsuit challenging the validity of those appointments. The Supreme Court unanimously agreed that the President had exceeded his authority under the Recess Appointments Clause, but it did not embrace the careful textual analysis of the lower court that called into question a number of the “mission-creep” uses of the Recess Appointment power that had gradually expanded over the course of the nation’s history, effectively ratifying many of the prior uses that had themselves exceeded the textual authority.

In *Schuette v. Coalition to Defend Affirmative Action*,³ the Court held by a 6-2 vote that racial preferences in higher education admissions can be prohibited by voter initiative. Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, wrote the plurality opinion, noting that whether to utilize race-based admissions policies to achieve racial diversity on campus is a decision that the Constitution leaves to the voters of a state. Justice Scalia, joined by Justice Thomas, concurred in the judgment, contending that because treating people according to their race for any purpose other than to remedy prior discrimination violates Equal Protection, it cannot possibly be the case that a voter initiative that requires

² *NLRB v. Canning*, 573 U.S. ____ (2014).

³ *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

equal treatment runs afoul of the Equal Protection clause. Justice Breyer also concurred in the judgment, but on much narrower grounds. Justice Sotomayor, joined by Justice Ginsburg (Justice Kagan was recused) dissented, arguing that by putting the ban on race-based admissions into the state constitution, the voters of Michigan had made it more difficult for racial minorities to obtain preferential treatment, in violation of the Equal Protection Clause. Of course, that's the rub: what is bedrock denial of equal protection in dissent was, for the majority, a reaffirmation of the principle that citizens are to be judged by the content of their character, not the color of their skin.

In *Harris v. Quinn*⁴ Justice Alito authored an opinion for a 5-4 majority that fashioned a category of partial public employees who could not be required to pay union dues to the public employee union. Prior decisions had established that a non-member could be compelled to pay for the proportionate part of Union dues devoted to terms of employment or collective bargaining. Home health care workers are, as a practical matter, under the immediate direction of their patients, and thus, not really free-riding, said the Court.

A home health care worker may not be the same as a nurse in a public hospital, but Justice Breyer for a majority of six found the virtually simultaneous re-broadcast on the internet to subscribers of over-the-air television programming to require a royalty payment.⁵ That programming was not accessed until an individual subscriber chose it and was sent to each subscriber separately over tiny antennas (nothing said about little green men) did not take the transmission outside the compensation requirements of the 1976 copyright act. Within days of the ruling, Aereo suspended operations, but said it would be back.

The Court unanimously found police need a warrant to search a cellphone of a person under arrest, absent exigent circumstances like the phone being used as a trigger.⁶ What's that? Is that the already listening, but self-gulaged, voice of Edward Snowden drifting across the Siberian plain shouting "Hooray for privacy!"

The large looming question from the mandating of same-sex marriage in *Obergefell* is to what extent, and over what set of activities, are religious institutions or religious individuals or even employers like Hobby-Lobby, where faith is claimed to guide their commercial endeavors, now subject to having their faith claims ignored or displaced in order to avoid "discrimination" in these respective venues against same-sex couples. If faith beliefs or practices cannot be protected from a conception of marriage at odds with particular doctrine is that a denial of free exercise? Is it the establishment of religion insofar as it can

⁴ *Harris v. Quinn*, 573 U.S. ____ (2014).

⁵ *ABC, Inc. et. al., v. Aereo, Inc.*, 573 U.S. ____ (2014).

⁶ *Riley v. California*, 573 U.S. ____ (2014).

be argued to have the effect of favoring one religious conception of marriage over another (although almost all churches define marriage as between a man and a women, a handful have recently started to sanction same sex unions as marriage) contrary to the *Lemon* “effect” standard of establishment? But if the newly articulated fundamental right to marriage is that favoritism, why weren’t the laws that previously favored marriage only between man and woman also an establishment? While the Justices finding an implied right were preoccupied with the claimed justification for their implication, and did not address a frontal establishment challenge, they did inquire at oral argument whether a nonconforming religion could be punished for adhering to its beliefs. The Solicitor General did not rule out the possibility of sanction. With both sides claiming to have right on their side, the Court has landed anew in a culturally divisive issue of the highest order.

DWK
SJP
JCE

August 2015

Chapter 2 THE DECLARATION AND ITS CONSTITUTION— LINKING FIRST PRINCIPLE TO NECESSARY MEANS

II. THE SPECIAL SIGNIFICANCE OF PREFERRED RELIGIOUS FREEDOM C. THE FREE EXERCISE CLAUSE—GOVERNMENT MAY NOT PROHIBIT RELIGIOUS EXPRESSION 6. The “Ministerial Exception”

ACO, p.262; Individual Rights, p. 203:

Insert after Hosanna-Tabor:

BURWELL v. HOBBY LOBBY STORES, INC.

___ U.S. ___ (2014)

* * *

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS’s argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages ... on others” or that require “the general public [to] pick up the tab.” And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby.” The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

* * *

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010(ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health insurance coverage” that provide “minimum essential coverage.” Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to

comply with ACA's group-health-plan requirements, the employer may be required to pay \$100 per day for each affected "individual." And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay \$2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require.

... The [HHS] Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." In its Guidelines, [HHS] exempted these organizations from the requirement to cover contraceptive services.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections." To qualify for this accommodation, an employer must certify that it is such an organization. When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. And employers with

fewer than 50 employees are not required to provide health insurance at all.

All told, the contraceptive mandate “presently does not apply to tens of millions of people.” This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

II
A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that “[t]he fetus in its earliest stages ... shares humanity with those who conceived it.”

* * *

The Hahns believe that they are required to run their business “in accordance with their religious beliefs and moral principles.”

* * *

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.” The District Court denied a preliminary injunction, and the Third Circuit affirmed in a divided opinion, holding that “for-profit, secular corporations cannot engage in religious exercise” within the meaning of RFRA or the First Amendment. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS “[m]andate does not impose any requirements on the Hahns” in their personal capacity.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation under Oklahoma law.

* * *

Like the Hahns, the Greens believe that life begins at conception and that it would violate their

religion to facilitate access to contraceptive drugs or devices that operate after that point. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. ...

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. The District Court denied a preliminary injunction, and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are "persons" within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to \$475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly \$26 million" annually if they "drop[ped] health-insurance benefits for all employees."

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative that HHS had failed to prove that enforcement of the mandate was the "least restrictive means" of furthering the Government's asserted interests. After concluding that the companies had "demonstrated irreparable harm," the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test.

We granted certiorari. 571 U.S. —, 134 S.Ct. 678, 187 L.Ed.2d 544 (2013).

III

A

RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA.

* * *

HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA’s text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

* * *

In holding that Conestoga, as a “secular, for-profit corporation,” lacks RFRA protection, the Third Circuit wrote as follows:

“General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”

All of this is true—but quite beside the point. Corporations, “separate and apart from” the human beings who own, run, and are employed by them, cannot do anything at all.

B
1

As we noted above, RFRA applies to “a person’s” exercise of religion, and RFRA itself does not define the term “person.” We therefore look to the Dictionary Act, which we must consult “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.”

Under the Dictionary Act, “the wor[d] ‘person’ ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” ...

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise.

* * *

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form?

* * *

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. “Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business.” ...

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue “any lawful purpose” or “act,” including the pursuit of profit in conformity with the owners’ religious principles. ...

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere “beliefs” of a corporation. HHS goes so far as to raise the specter of “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.”

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to whom HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA’s protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to “institutionalized persons,” a category that consists

primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented. Nevertheless, after our decision in *City of Boerne*, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

* * *

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. We have little trouble concluding that it does.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of \$2,000 per employee each year. § 4980H. These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.

B

Although these totals are high, *amici* supporting HHS have suggested that the \$2,000

per-employee penalty is actually less than the average cost of providing health insurance, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, and there are strong reasons to adhere to that practice in these cases. ...

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. Likewise, employers can deduct the cost of providing health insurance, but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee

chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

* * *

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a *religious* objection to the subsidies. As we put it in *Tilton*, they were “unable to identify any coercion directed at the practice or exercise of their religious beliefs.” Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

A

* * *

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” But the contraceptive mandate is expressly excluded from this subset.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.”

B

The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown that this is not a viable alternative. . . . It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office’s most recent forecasts, ACA’s insurance-coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS’s argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because “RFRA cannot be used to require creation of entirely new programs.” But we see nothing in RFRA that supports this argument, and drawing the line between the “creation of an entirely new program” and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs. HHS’s view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order

to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. HHS has already established an accommodation for nonprofit organizations with religious objections. ...

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," because their employers' insurers would be responsible for providing information and coverage. Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,' because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated."

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and

may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. We noted that “[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes.” Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.” We observed that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. ...

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by *Conestoga*

and the Hahns.

The judgment of the Tenth Circuit is affirmed; the judgment of the Third Circuit is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

It seems to me appropriate, in joining the Court’s opinion, to add these few remarks. At the outset it should be said that the Court’s opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. It is to ensure that interests in religious freedom are protected. (GINSBURG, J., dissenting).

* * *

“[T]he American community is today, as it long has been, a rich mosaic of religious faiths.” *Town of Greece v. Galloway* (2014) (KAGAN, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

For these reasons and others put forth by the Court, I join its opinion.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab.

The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the

Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

I

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Southeastern Pa. v. Casey* (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs. Carrying out Congress’ direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court’s resolution of these cases.

* * *

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga⁷ might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990).

* * *

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. It would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. In sum, with respect to free exercise claims no less than free speech claims, “ ‘[y]our right to swing your arms ends just where the other man’s nose begins.’ ” Chafee, *Freedom of Speech in War Time*, 32 *Harv. L.Rev.* 932, 957 (1919).

III A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*.”

Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal (2006).

RFRA’s purpose is specific and written into the statute itself. The Act was crafted to “restore the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.”

* * *

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence.

* * *

C

With RFRA’s restorative purpose in mind, I turn to the Act’s application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby’s and Conestoga’s claims: Do for-profit corporations rank among “person[s]” who “exercise ... religion”? Assuming that they do, does the contraceptive coverage requirement “substantially burden” their religious exercise? If so, is the requirement “in furtherance of a compelling government interest”? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA’s compelling interest test, as noted, applies to government actions that “substantially burden *a person’s exercise of religion*.” This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act, which extends to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” The Dictionary Act’s definition, however, controls only where “context” does not “indicat[e] otherwise.” Here, context does so indicate. RFRA speaks of “*a person’s exercise of religion*.” Whether a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-*Smith* “free-exercise caselaw.” There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries

ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, and no desires.” *Citizens United v. Federal Election Comm’n* (2010).

The First Amendment’s free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.” No such solicitude is traditional for commercial organizations.¹⁵ Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.”

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court’s attention. One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations.

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court’s side. Recognition of the discrete characters of “ecclesiastical and lay” corporations dates back to Blackstone, see 1 W. Blackstone, *Commentaries on the Laws of England* 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. To reiterate, “for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].”

* * *

The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement “substantially burden[s] [their] exercise of religion.” Congress no doubt meant the modifier “substantially” to carry weight. In the original draft of RFRA, the word “burden” appeared unmodified. The word “substantially” was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court’s pre-*Smith* case law, “does not require the Government to justify every action that has some effect on religious exercise.”

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens’ and Hahns’ “belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” I agree with the Court that the Green and Hahn families’ religious convictions regarding contraception are sincerely held. But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal conclusion ... that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake.

* * *

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” It is doubtful that Congress, when it specified that burdens must be “substantial[ly],” had in mind a linkage thus interrupted by independent decision makers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women’s well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain

cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court’s reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives.

* * *

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes.

The ACA’s grandfathering provision allows a phasing-in period for compliance with a number of the Act’s requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. Hobby Lobby’s own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby’s counsel explained that the “grandfathering requirements mean that you can’t make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing.” Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time.” The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013.

The Court ultimately acknowledges a critical point: RFRA’s application “*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA’s least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers’ religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA’s contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A “least restrictive means” cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere

unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing ... contraceptives ... to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed.Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that."

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. A tax credit, of course, is one variety of "let the government pay." In addition to departing from the existing employer-based system of health insurance, Conestoga's alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, *i.e.*, comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

* * *

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?³¹ According to counsel for Hobby Lobby, "each one of these cases ... would have to be evaluated on its own ... apply [ing] the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged ... substantially in the exchange of goods or services for money beyond nominal amounts."

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with Justice GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III-C-1 of Justice GINSBURG's dissenting opinion.

Chapter 3 A STRUCTURALLY-DIVIDED, BUT WORKABLE, GOVERNMENT

B. THE SEPARATION OF POWERS—IN CONSTITUTIONAL PRACTICE

2. The Legislative Power

ACO p. 333; History, p. 141

Insert before Note 7 the following new Note 7 after *Chadha*, and renumber existing notes 7-10 to 8-11:

7. In several opinions during the 2014-2015 term, Justice Thomas invited wholesale reconsideration of the Court’s moribund non-delegation doctrine. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), for example, Justice Thomas wrote a separate concurring opinion to point out that the “appropriate and necessary” language in the environmental protection statute, which the Court interpreted as requiring agency consideration of costs, was actually so open-ended as to be a potentially unconstitutional delegation of Congress’s lawmaking power. He wrote:

Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? We are told that the breadth of the word “appropriate” authorizes EPA to decide for itself how to answer that question. . . . Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, *we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.* . . . As in other areas of our jurisprudence concerning administrative agencies . . . *we seem to be straying further and further from the Constitution without so much as pausing to ask why.* We should stop to consider that document before blithely giving the force of law to any other agency “interpretations” of federal statutes.

Similarly, in *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015), in which the Court unanimously held that Amtrak was acting as part of the federal government and not a private entity when adopting rules for the usage of rail lines, Justice Thomas wrote separately to question whether Amtrak, or any federal agency, could be delegated the power to “formulate generally applicable rules of private conduct,” when the Constitution explicitly vests the lawmaking power in Congress. In his view,

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. *I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.* . . . We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative

apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Do you think Justice Thomas’s invitation will yield a serious reconsideration of the non-delegation doctrine?

3. The Executive Power

b. The Practical Exercise of Executive Authority—The President and the Bureaucracy

(1) Power of Appointment

ACO p. 367; History, p. 174

Insert after the notes following *Myers*:

NLRB v. NOEL CANNING 573 U.S. ___, 134 S. Ct. 2550 (2014)

JUSTICE BREYER delivered the opinion of the Court.

* * *

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Office[r] of the United States.” Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause. The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “*pro forma*

session[s],” with “no business ... transacted,” every Tuesday and Friday through January 20, 2012. In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute [involving refusal to put in writing and execute a collective bargaining agreement]. The National Labor Relations Board (NLRB) found that a Pepsi–Cola distributor, Noel Canning, had [acted] unlawfully The Board ordered the distributor to execute the agreement and to make employees whole for any losses. The Pepsi–Cola distributor claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012. The President’s January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor’s view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3–day adjournment, which is not long enough to trigger the Recess Appointments Clause.

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President “shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States” (emphasis added).

The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm (at least for principal officers). At the same time, the need to secure Senate approval provides “an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” [The Federalist No. 76.] Hamilton further explained that the “ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*,

which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President *singly* to make temporary appointments.” The Federalist No. 67.

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President’s continuous need for “the assistance of subordinates,” *Myers v. United States*, 272 U.S. 52, 117 (1926), and, on the other, the Senate’s practice, particularly during the Republic’s early years, of meeting for a single brief session each year. We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, *in interpreting the Clause, we put significant weight upon historical practice*. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government . . . *The Pocket Veto Case* (1929).

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, and that it is the “duty of the judicial department”—in a separation-of-powers case as in any other—“to say what the law is,” *Marbury v. Madison*. But it is equally true that the longstanding “practice of the government,” *McCulloch*, can inform our determination of “what the law is.” That principle is neither new nor controversial. As James Madison wrote, it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.” And our cases have continually confirmed Madison’s view. *Mistretta v. United States* (1989); *Dames & Moore v. Regan*, (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (Frankfurter, J., concurring); *McCulloch*; *Stuart v. Laird*, (1803). These precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. See *Mistretta* (“While these [practices] spawned spirited discussion and frequent criticism, . . . ‘traditional ways of conducting government . . . give meaning’ to the Constitution” (quoting *Youngstown*) (Frankfurter, J., concurring)); *Regan* (“[E]ven if the pre-1952 [practice] should be disregarded, congressional acquiescence in [a practice] since that time supports the President’s power to act here”).

There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase “*the recess* of the Senate.”(emphasis added). The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an “inter-session recess. “The Senate and the House also take breaks in the midst of a session. The Senate or

the House announces any such “intra-session recess” by adopting a resolution stating that it will “adjourn” to a fixed date, a few days or weeks or even months later. All agree that the phrase “the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work...”

The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. See, e.g., 3 Records of the Federal Convention of 1787, p. 76 (M. Farrand rev. 1966) (hereinafter Farrand) (letter from George Washington to John Jay using “the recess” to refer to an intra-session break of the Constitutional Convention); *id.*, at 191 (speech of Luther Martin with a similar usage); 1 T. Jefferson, A Manual of Parliamentary Practice § LI, p. 165 (2d ed. 1812) (describing a “recess by adjournment” which did not end a session).

We recognize that the word “the” in “*the* recess” might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word “the” frequently (but not always) indicates “a particular thing.” 2 Johnson 2003. But the word can also refer “to a term used generically or universally.” 17 OED 879. The Constitution, for example, directs the Senate to choose a President *pro tempore* “in the Absence of the Vice–President.” Art. I, § 3, cl. 5 (emphasis added). And the Federalist Papers refer to the chief magistrate of an ancient Achaean league who “administered the government in *the* recess of the Senate.” Federalist No. 18 (Madison) (emphasis added). Reading “the” generically in this way, there is no linguistic problem applying the Clause’s phrase to both kinds of recess. And, in fact, the phrase “the recess” was used to refer to intra-session recesses at the time of the founding. See, e.g., 3 Farrand 76 (letter from Washington to Jay); New Jersey Legislative–Council Journal, 5th Sess., 1st Sitting 70, 2d Sitting 9 (1781) (twice referring to a 4–month, intra-session break as “the Recess”).

The constitutional text is thus ambiguous. And we believe the Clause’s purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. We concede that pre-Civil War history is not helpful. But it shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas). Obviously, if there are no significant intra-session recesses, there will be no intra-session recess appointments. In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments. Attorney General Evarts also issued three opinions concerning the constitutionality of President Johnson’s appointments, and it apparently did not occur to him that the distinction between intra-session and inter-session recesses was significant. Similarly, though the 40th

Congress impeached President Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments.

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments. Not surprisingly, the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the Clause authorizes these appointments. We must note one contrary opinion authored by President Theodore Roosevelt's Attorney General Philander Knox. Knox advised the President that the Clause did not cover a 19-day intra-session Christmas recess. But in doing so he relied heavily upon the use of the word "the," a linguistic point that we do not find determinative. And Knox all but confessed that his interpretation ran contrary to the basic purpose of the Clause. Moreover, only three days before Knox gave his opinion, the Solicitor of the Treasury came to the opposite conclusion. We therefore do not think Knox's isolated opinion can disturb the consensus advice within the Executive Branch taking the opposite position.

What about the Senate? Since Presidents began making intra-session recess appointments, individual Senators have taken differing views about the proper definition of "the recess." But neither the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*.

[S]ome argue that the Founders would likely have intended the Clause to apply only to inter-session recesses, for they hardly knew any other. The problem with this argument, however, is that it does not fully describe the relevant founding intent. The question is not: Did the Founders at the time think about intra-session recesses? Perhaps they did not. The question is: Did the Founders intend to restrict the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances? The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is "intended to endure for ages to come," and must adapt itself to a future that can only be "seen dimly," if at all. *McCulloch*. We therefore think the Framers likely did intend the Clause to

apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language.

Second, some argue that the intra-session interpretation permits the President to make “illogic[ally]” long recess appointments. A recess appointment made between Congress’ annual sessions would permit the appointee to serve for about a year, *i.e.*, until the “end” of the “next” Senate “session.” But an intra-session appointment made at the beginning or in the middle of a formal session could permit the appointee to serve for 1 ½; or almost 2 years (until the end of the following formal session).

We agree that the intra-session interpretation permits somewhat longer recess appointments, but we do not agree that this consequence is “illogical.” A President who makes a recess appointment will often also seek to make a regular appointment, nominating the appointee and securing ordinary Senate confirmation. And the Clause ensures that the President and Senate always have at least a full session to go through the nomination and confirmation process. A recess appointment that lasts somewhat longer than a year will ensure the President the continued assistance of subordinates that the Clause permits him to obtain while he and the Senate select a regular appointee.

Third, the Court of Appeals believed that application of the Clause to intra-session recesses would introduce “vagueness” into a Clause that was otherwise clear. One can find problems of uncertainty, however, either way. In 1867, for example, President Andrew Johnson called a special session of Congress, which took place during a lengthy intra-session recess. Consider the period of time that fell just after the conclusion of that special session. Did that period remain an intra-session recess, or did it become an inter-session recess? Historians disagree or suppose that Congress adjourns *sine die*, but it does so conditionally, so that the leadership can call the members back into session when “the public interest shall warrant it.” If the Senate Majority Leader were to reconvene the Senate, how would we characterize the preceding recess? Is it still inter-session? On the narrower interpretation the label matters; on the broader it does not.

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a “recess”? The Clause itself does not say.[W]e think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

Moreover, the lack of a textual floor raises a problem that plagues both interpretations—Justice Scalia’s and ours. Today a brief inter-session recess is just as possible as a brief intra-session recess.

The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. The lack of examples suggests that the recess-appointment power is not needed in that context. There are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days. But when considered against 200 years of settled practice, we regard these few scattered examples as anomalies. We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is

presumptively too short to fall within the Clause. We add the word “presumptively” to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. [T]he phrase “the recess” applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well.

IV

The second question concerns the scope of the phrase “vacancies *that may happen* during the recess of the Senate.” Art. II, § 2, cl. 3 (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause’s language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of “happens” as applied to a “vacancy” (at least to a modern ear) is that the vacancy “happens” when it initially occurs. See 1 Johnson 913 (defining “happen” in relevant part as meaning “[t]o fall out; to chance; to come to pass”). But that is not the only possible way to use the word.

[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. *The Pocket Veto Case*. We consequently go on to consider the Clause’s purpose and historical practice. The Clause’s purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.

Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a President’s nominee just before a recess, too late to select another. Thus the broader construction, encompassing vacancies that initially occur before the beginning of a recess, is the “only construction of the constitution which is compatible with its spirit, reason, and purposes; while, at the same time, it offers no violence to its language.” [quoting opinion of Attorney General William Wirt]

We do not agree with Justice Scalia’s suggestion that the Framers would have accepted the catastrophe envisioned by Wirt because Congress can always provide for acting officers, and the President can always convene a special session of Congress. Acting officers may have less authority than Presidential appointments. Moreover, to rely on acting officers would lessen the President’s ability to staff the Executive Branch with people of his own choosing, and thereby limit the President’s control and political accountability. Special sessions are burdensome (and would have been especially so at the time of the founding). The point of the Recess Appointments Clause was to avoid reliance on these inadequate expedients.

At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to “fill up all vacancies” that occur before, and continue to exist during, the Senate’s recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might thereby routinely avoid the constitutional need to obtain the Senate’s “advice and consent.”

Wirt thought considerations of character and politics would prevent Presidents from abusing the Clause in this way. He might have added that such temptations should not often arise. It is often less desirable for a President to make a recess appointment. A recess appointee only serves a limited term. That, combined with the lack of Senate approval, may diminish the recess appointee’s ability, as a practical matter, to get a controversial job done. And even where the President and Senate are at odds over politically sensitive appointments, compromise is normally possible. Moreover, the Senate, like the President, has institutional “resources,” including political resources, “available to protect and assert its interests.” In an unusual instance, where a matter is important enough to the Senate, that body can remain in session, preventing recess appointments by refusing to take a recess. In any event, the Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it.

[W]e believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant. Overall, like Attorney General Wirt, we believe the broader interpretation more consistent with the Constitution’s “reason and spirit.”

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. There is no undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson making such an appointment, though the Solicitor General believes he has found records showing that Presidents Washington and Jefferson did so. We know that Edmund Randolph, Washington’s Attorney General, favored a narrow reading of the Clause. Randolph believed that the “Spirit of the Constitution favors the participation of the Senate in all appointments,” though he did not address—let alone answer—the powerful purposive and structural arguments subsequently made by Attorney General Wirt.

President Adams seemed to endorse the broader view of the Clause in writing, though we are not aware of any appointments he made in keeping with that view. His Attorney General, Charles Lee, later informed Jefferson that, in the Adams administration, “whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of enquiring for a proper character, they let it lie always till recess.” We know that President Jefferson thought that the broad interpretation was linguistically supportable, though his actual practice is not clear. But the evidence suggests that James Madison—as familiar as anyone with the workings of the Constitutional Convention—appointed Theodore Gaillard to replace a district judge who had left office before a recess began. It also appears that

in 1815 Madison signed a bill that created two new offices prior to a recess which he then filled later during the recess. He also made recess appointments to “territorial” United States attorney and marshal positions, both of which had been created when the Senate was in session more than two years before. Justice Scalia refers to “written evidence of Madison’s own beliefs,” but in fact we have no direct evidence of what President Madison believed. We only know that he declined to make one appointment to a pre-recess vacancy after his Secretary of War advised him that he lacked the power. On the other hand, he did apparently make at least five other appointments to pre-recess vacancies.

The next President, James Monroe, received and presumably acted upon Attorney General Wirt’s advice, namely that “all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President.” Nearly every subsequent Attorney General to consider the question throughout the Nation’s history has thought the same. Indeed, as early as 1862, Attorney General Bates advised President Lincoln that his power to fill pre-recess vacancies was “settled ... as far ... as a constitutional question can be settled,” and a century later Acting Attorney General Walsh gave President Eisenhower the same advice “without any doubt.”

This power is important. No one disputes that every President since James Buchanan has made recess appointments to pre-existing vacancies. Common sense also suggests that many recess appointees filled vacancies that arose before the recess began.

Did the Senate object? Early on, there was some sporadic disagreement with the broad interpretation. In 1814 Senator Gore said that if “the vacancy happen at another time, it is not the case described by the Constitution.” In 1822 a Senate committee, while focusing on the President’s power to fill a new vacancy created by statute, used language to the same effect. And early Congresses enacted statutes authorizing certain recess appointments, a fact that may or may not suggest they accepted the narrower interpretation of the Clause. Most of those statutes—including the one passed by the First Congress—authorized appointments to newly created offices, and may have been addressed to the separate question of whether new offices are vacancies within the meaning of the Clause.

[I]n 1863 the Senate Judiciary Committee disagreed with the broad interpretation. It issued a report concluding that a vacancy “must have its inceptive point after one session has closed and before another session has begun.” And the Senate then passed the Pay Act, which provided that “no money shall be paid ... as a salary, to any person appointed during the recess of the Senate, to fill a vacancy ... which ... existed while the Senate was in session.” Relying upon the floor statement of a single Senator, Justice Scalia suggests that the passage of the Pay Act indicates that the Senate as a whole endorsed the position in the 1863 Report. But the circumstances are more equivocal. During the floor debate on the bill, not a single Senator referred to the Report. Indeed, Senator Trumbull, who introduced the Pay Act, acknowledged that there was disagreement about the underlying constitutional question.

In any event, the Senate subsequently abandoned its hostility. In the debate preceding the 1905 Senate Report regarding President Roosevelt’s “constructive” recess appointments, Senator Tillman—who chaired the Committee that authored the 1905 Report—brought up the 1863 Report, and another Senator responded: “Whatever that report may have said in 1863, I do not think that has been the view the Senate has taken” of the issue. Senator Tillman then agreed. And Senator Tillman’s 1905 Report

described the Clause’s purpose in terms closely echoing Attorney General Wirt. In 1916 the Senate debated whether to pay a recess appointee who had filled a pre-recess vacancy and had not subsequently been confirmed. Both Senators to address the question—one on each side of the payment debate—agreed that the President had the constitutional power to make the appointment, and the Senate voted to pay the appointee for his service. In 1927 the Comptroller General, a legislative officer, wrote that “there is no question but that the President has authority to make a recess appointment to fill *any* vacancy,” including those that “existed while the Senate was in session.” (emphasis added). Meanwhile, Presidents continued to make appointments to pre-recess vacancies.

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. The tradition is long enough to entitle the practice “to great regard in determining the true construction” of the constitutional provision. *The Pocket Veto Case*. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase “all vacancies” includes vacancies that come into existence while the Senate is in session.

V

The third question concerns the calculation of the length of the Senate’s “recess.” The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 *pro forma* sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3–day recess, which is too short to trigger the President’s recess-appointment power. If the latter, however, then the 3–day period was part of a much longer recess during which the President did have the power to make recess appointments.

In our view, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to “determine the Rules of its Proceedings.” Art. I, § 5, cl. 2. In addition, the Constitution provides the Senate with extensive control over its schedule. There are only limited exceptions. See Amdt. 20, § 2 (Congress must meet once a year on January 3, unless it specifies another day by law); Art. II, § 3 (Senate must meet if the President calls it into special session); Art. I, § 5, cl. 4 (neither House may adjourn for more than three days without consent of the other). See also Art. II, § 3 (“[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper”). The Constitution thus gives the Senate wide latitude to determine

whether and when to have a session, as well as how to conduct the session. This suggests that the Senate's determination about what constitutes a session should merit great respect.

Furthermore, this Court's precedents reflect the breadth of the power constitutionally delegated to the Senate. We generally take at face value the Senate's own report of its actions. When, for example, "the presiding officers" of the House and Senate sign an enrolled bill (and the President "approve[s]" it), "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Marshall Field & Co. v. Clark*, (1892).

For these reasons, we conclude that we must give great weight to the Senate's own determination of when it is and when it is not in session. But our deference to the Senate cannot be absolute. When the Senate is without the capacity to act, under its own rules, it is not in session even if it so declares. In that circumstance, the Senate is not simply unlikely or unwilling to act upon nominations of the President. It is unable to do so. The purpose of the Clause is to ensure the continued functioning of the Federal Government while the Senate is unavailable. This purpose would count for little were we to treat the Senate as though it were in session even when it lacks the ability to provide its "advice and consent." Art. II, § 2, cl. 2. Accordingly, we conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the *pro forma* sessions were sessions for purposes of the Clause. First, the Senate said it was in session. The Journal of the Senate and the Congressional Record indicate that the Senate convened for a series of twice-weekly "sessions" from December 20 through January 20. And these reports of the Senate "must be assumed to speak the truth." Second, the Senate's rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During *any pro forma* session, the Senate could have conducted business simply by passing a unanimous consent agreement. "The Senate in fact conducts much of its business through unanimous consent. Senate rules presume that a quorum is present unless a present Senator questions it. And when the Senate has a quorum, an agreement is unanimously passed if, upon its proposal, no present Senator objects. It is consequently unsurprising that the Senate has enacted legislation during *pro forma* sessions even when it has said that no business will be transacted. Indeed, the Senate passed a bill by unanimous consent during the second *pro forma* session after its December 17 adjournment. And that bill quickly became law.

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not. The Solicitor General asks us to engage in a more realistic appraisal of what the Senate actually did. He argues that, during the relevant *pro forma* sessions, business was not in fact conducted; messages from the President could not be received in any meaningful way because they could not be placed before the Senate; the Senate Chamber was, according to C-SPAN coverage, almost empty; and in practice attendance was not required.

We do not believe, however, that engaging in the kind of factual appraisal that the Solicitor General suggests is either legally or practically appropriate. From a legal perspective, this approach would

run contrary to precedent instructing us to “respect ... coequal and independent departments” by, for example, taking the Senate’s report of its official action at its word. From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.

Finally, the Solicitor General warns that our holding may “disrup[t] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” We do not see, however, how our holding could significantly alter the constitutional balance. Most appointments are not controversial and do not produce friction between the branches. Where political controversy is serious, the Senate unquestionably has other methods of preventing recess appointments. [T]he Senate could preclude the President from making recess appointments by holding a series of twice-a-week ordinary (not *pro forma*) sessions. And the nature of the business conducted at those ordinary sessions—whether, for example, Senators must vote on nominations, or may return to their home States to meet with their constituents—is a matter for the Senate to decide. The Constitution also gives the President (if he has enough allies in Congress) a way to force a recess. Art. II, § 3 (“[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper”). Moreover, the President and Senators engage with each other in many different ways and have a variety of methods of encouraging each other to accept their points of view. [T]he Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. That structure foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.

VI

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, concurring in the judgment.

This case requires us to decide whether the Recess Appointments Clause authorized three appointments made by President Obama to the National Labor Relations Board in January 2012 without the Senate’s consent. To prevent the President’s recess-appointment power from nullifying the Senate’s role in the appointment process, the Constitution cabins that power in two significant ways.

First, it may be exercised only in “the Recess of the Senate,” that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that “happen during the Recess,” that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution’s text and structure, and both were well understood at the founding. Today’s Court agrees

that the appointments were invalid, but for the far narrower reason that they were made during a 3–day break in the Senate’s session. [T]he majority holds, first, that the President can make appointments without the Senate’s participation even during short breaks in the middle of the Senate’s session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor.

The Court’s decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority’s insistence on deferring to the Executive’s untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court’s role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

I. Our Responsibility

Today’s majority disregards two overarching principles that ought to guide our consideration of the questions presented here.

First, the Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Second and relatedly, when questions involving the Constitution’s government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch “to say what the law is.”

Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision. But “[p]ast practice does not, by itself, create power.” *Medellín v. Texas* (quoting *Dames & Moore v. Regan*). That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.

Ignoring our more recent precedent in this area, which is extensive, the majority relies on *The Pocket Veto Case* for the proposition that when interpreting a constitutional provision “regulating the relationship between Congress and the President,” we must defer to the settled practice of the political branches if the provision is ““in any respect of doubtful meaning.”” The language the majority quotes from that case was pure dictum. The *Pocket Veto* Court had to decide whether a bill passed by the House and Senate and presented to the President less than 10 days before the adjournment of the first session of a particular Congress, but neither signed nor vetoed by the President, became a law. Most of the opinion analyzed that issue like any other legal question and concluded that treating the bill as a law would have been inconsistent with the text and structure of the Constitution. Only near the end of the opinion did the Court

add that its conclusion was “confirmed” by longstanding Presidential practice in which Congress appeared to have acquiesced. We did not suggest that the case would have come out differently had the longstanding practice been otherwise.

II. Intra-Session Breaks

I would hold that “the Recess” is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made *during* the Senate’s session. The Court’s contrary conclusion is inconsistent with the Constitution’s text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role.

A. Plain Meaning

A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term “Recess” in contradistinction to the term “Session.” As Alexander Hamilton wrote: “The time within which the power is to operate ‘during the recess of the Senate’ and the duration of the appointments ‘to the end of the next session’ of that body, conspire to elucidate the sense of the provision.” The Federalist No. 67.

In the founding era, the terms “recess” and “session” had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments “*sine die*,” that is, without a specified return date. By contrast, other provisions of the Constitution use the verb “adjourn” rather than “recess” to refer to the commencement of breaks during a formal legislative session. See, *e.g.*, Art. I, § 5, cl. 1; *id.*, § 5, cl. 4.

As every commentator on the Clause until the 20th century seems to have understood, the “Recess” and the “Session” to which the Clause refers are mutually exclusive, alternating states. See, *e.g.*, The Federalist No. 67 (explaining that appointments would require Senatorial consent “during the session of the Senate” and would be made by the President alone “in their recess”). It is linguistically implausible to suppose—as the majority does—that the Clause uses one of those terms (“Recess”) informally and the other (“Session”) formally in a single sentence, with the result that an event can occur during both the “Recess” and the “Session.”

Besides being linguistically unsound, the majority’s reading yields the strange result that an appointment made during a short break near the beginning of one official session will not terminate until the end of the *following* official session, enabling the appointment to last for up to two years. One way to avoid the linguistic incongruity of the majority’s reading would be to read both “the Recess” and “the next Session” colloquially, so that the recess-appointment power would be activated during any temporary suspension of Senate proceedings, but appointments made pursuant to that power would last only until the beginning of the next suspension (which would end the next colloquial session). That approach would be more linguistically defensible than the majority’s. But it would not cure the most fundamental problem with giving “Recess” its colloquial, rather than its formal, meaning: Doing so leaves the recess-appointment power without a textually grounded principle limiting the time of its exercise.

The majority disregards another self-evident purpose of the Clause: to preserve the Senate’s role in the appointment process—which the founding generation regarded as a critical protection against “despotism,”—by clearly delineating the times when the President can appoint officers without the Senate’s consent. Today’s decision seriously undercuts that purpose. In doing so, it demonstrates the folly of interpreting constitutional provisions designed to establish “a structure of government that would protect liberty,” on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible.

To avoid the absurd results that follow from its colloquial reading of “the Recess,” the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase’s colloquial meaning—are simply “too short to trigger the Recess Appointments Clause.” But it identifies no textual basis whatsoever for limiting the length of “the Recess,” nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate. Other structural provisions of the Constitution that turn on duration are quite specific: Neither House can adjourn “for more than three days” without the other’s consent. Art. I, § 5, cl. 4. The President must return a passed bill to Congress “within ten Days (Sundays excepted),” lest it become a law. *Id.*, § 7, cl. 2.

Fumbling for some textually grounded standard, the majority seizes on the Adjournments Clause. According to the majority, that clause establishes that a 3-day break is always “too short” to trigger the Recess Appointments Clause. [T]he fact that the Constitution includes a 3-day limit in one clause but omits it from the other weighs strongly against finding such a limit to be implicit in the clause in which it does not appear.

B. Historical Practice

For the foregoing reasons, the Constitution’s text and structure unambiguously refute the majority’s freewheeling interpretation of “the Recess.” The majority, however, insists that history “offers strong support” for its interpretation. The historical practice of the political branches is, of course, irrelevant when the Constitution is clear. But even if the Constitution were thought ambiguous on this point, history does not support the majority’s interpretation.

[The opinion then assesses the history of “intra-session breaks.”]

Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends “strong support” to its interpretation of the Recess Appointments Clause. And the majority’s contention that recent executive practice in this area merits deference because the Senate has not done more to oppose it is utterly divorced from our precedent.

Moreover, the majority's insistence that the Senate gainsay an executive practice "as a body" in order to prevent the Executive from acquiring power by adverse possession will systematically favor the expansion of executive power at the expense of Congress. In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch. All Presidents have a high interest in expanding the powers of their office, since the more power the President can wield, the more effectively he can implement his political agenda. The majority's methodology thus all but guarantees the continuing aggrandizement of the Executive Branch.

III. Pre-Recess Vacancies

I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here—which undisputedly filled pre-recess vacancies—are invalid for that reason as well as for the reason that they were made during the session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority's conclusion on this issue.

A. Plain Meaning

[N]o reasonable reader would have understood the Recess Appointments Clause to empower the President to fill all vacancies that might exist during a recess, regardless of when they arose. For one thing, the Clause's language would have been a surpassingly odd way of giving the President that power.

For another thing, the majority's reading not only strains the Clause's language but distorts its constitutional role, which was meant to be subordinate. As Hamilton explained, appointment with the advice and consent of the Senate was to be "the general mode of appointing officers of the United States." The Federalist No. 67. The unilateral power conferred on the President by the Recess Appointments Clause was therefore understood to be "nothing more than a supplement" to the "general method" of advice and consent.

On the majority's reading, the President would have had no need *ever* to seek the Senate's advice and consent for his appointments: Whenever there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*.

B. Historical Practice

[I]t is clear that the Constitution authorizes the President to fill unilaterally only those vacancies that arise during a recess, not every vacancy that happens to exist during a recess. Again, however, the majority says "[h]istorical practice" requires the broader interpretation. And again the majority is mistaken. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority's interpretation.

[The opinion then assesses the history of “using a recess appointment to fill a pre-recess vacancy.”]

In sum: Washington’s and Adams’ Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of “historical practice”—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.

IV. Conclusion

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a consistent and unchallenged practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution’s original meaning. There is thus no ground for the majority’s deference to the unconstitutional recess-appointment practices of the Executive Branch.

The real tragedy of today’s decision is not simply the abolition of the Constitution’s limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution’s structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution’s enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand.

c. Speech Within Private Associations

ACO, p. 394; History, p. 201

Add a new paragraph before section “d”:

An interesting twist in the ongoing *Chevron* saga occurred in *King v. Burwell*, 135 S.Ct. 2480 (2015). Section 1311 of The Patient Protection and Affordable Care Act (aka “Obamacare”), 42 U.S.C. § 18031(a), authorizes funds to subsidize health insurance purchased by certain low-income individuals “on exchanges established by the State.” After a number of States declined to establish health insurance exchanges in their States, the U.S. Department of Health and Human Services established a federal exchange to operate in those states, and by regulation the Internal Revenue Service made the subsidies available not just to individuals purchasing health insurance on the state exchanges, but to those who purchased it on the federal exchange as well. A group of residents of the State of Virginia — a state that elected not to establish a state exchange — challenged the federal exchange subsidy, contending that without the subsidy, they would have been exempt from the individual mandate to purchase health insurance at all (the mandate exempts those for whom the cost of insurance would exceed eight percent of their income). Chief Justice Roberts, writing for the Court, declined to give *Chevron* deference to the IRS interpretation of the statute. After noting that “in extraordinary cases, . . . there may be reason to hesitate before concluding that Congress” intended an implicit delegation to an administrative agency to fill in the statutory gaps of an ambiguous statute, Chief Justice Roberts concluded that the Affordable Care Act was such a case. “The tax credits are among the Act’s key reforms,” he wrote, and whether they are available on the Federal Exchanges “is thus a question of deep ‘economic and political significance’ that is central to the statutory scheme.” “[H]ad Congress wished to assign that question to an agency,” the Chief observed, “it surely would have done so expressly.” “It is especially unlikely that Congress would have delegated this decision [whether to make subsidies available on the Federal Exchanges] to the *IRS*, which has no expertise in crafting health insurance policy of this sort.” Chief Justice Roberts then conducted a *de novo* assessment of the meaning of the statutory language and determined that “exchanges established by the State” was sufficiently ambiguous that, in his view, it could plausibly be read to include exchanges established not by the State but by the Federal Government on the State’s behalf. Although he recognized that a court must enforce a statute “according to its terms” “[i]f the statutory language is plain,” he added that “oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’” (quoting *Brown & Williamson*). Chief Justice Roberts then found that “established by the State” was ambiguous when viewed in the context of the entire statute, and read “established by the State” more broadly than its natural reading would suggest, in order not to undermine the central purpose of the statute. Justice Scalia, joined by Justices Thomas and Alito in dissent, had a stridently different view: “Words no longer have meaning if an Exchange that is *not* established by a State is ‘established by the State,’” he wrote. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”

So, is the Court's unwillingness to give *Chevron* deference to the executive agencies just a peculiar anomaly of the Affordable Care Act, or does it represent a more broad-based retreat from *Chevron* deference?

d. The President and the World (Herein of Foreign Policy)

ACO, p. 426; History, p. 233

Insert at the end of Note 10:

In the second round of *Zivotofsky v. Kerry*, 576 U.S. ____ (2015), a majority of the Court held that the President has the exclusive power to grant formal recognition to a foreign sovereign so that Section 214(d) was unconstitutional. Justice Kennedy wrote for the Court, and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, while Justice Thomas filed an opinion concurring in part and dissenting in part. A curiosity of the case was that Chief Justice Roberts, who had, early in his career, been an associate White House Counsel tasked with defending the President's prerogatives, dissented. Justice Alito joined in his opinion, and Justices Roberts and Alito joined in another dissenting opinion filed by Justice Scalia.

Justice Kennedy's opinion purported to be a straightforward analysis of the historical power of the President, and asserted that "At the time of the founding . . . prominent international scholars suggested that receiving an ambassador [a power clearly delegated to the President under Article II, Section 3 of the Constitution] was tantamount to recognizing the sovereignty of the sending state." Citing E. de Vattel, *The Law of Nations*, Section 78, p. 461 (J. Chitty ed. 1853), and also works by the other two great civilians, Bynkershoek and Grotius. This view, Kennedy observed, was consistent throughout the history of the nation, and was consistent as well with the Article II powers granting the President the right to make Treaties, and to nominate and appoint Ambassadors, public Ministers and Consuls (although, of course, Article II specifies that these latter two activities require the advice and consent of the Senate).

In determining whether the power to recognize foreign nations and governments was exclusive to the executive, Justice Kennedy wrote that "Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not," and that "These assurances cannot be equivocal." Therefore, apparently, Congress could not share in the recognition over sovereignty of Jerusalem by Israel, which decision was exclusive to the executive. While Justice Kennedy declined to hold, as the Secretary had asked, that that the President has "exclusive authority to conduct diplomatic relations," and "the bulk of foreign-affairs powers," an assertion Kennedy described as a "submission that the President has broad, undefined powers over foreign affairs," he did make it clear that the recognition power, and thus the decision over whether Israel's claim to sovereignty over Jerusalem was valid, was one for the President alone, and that this power included the power to indicate on a Passport that one born in Jerusalem was or was not born in Israel. Justice Breyer concurred in the judgment, but because he believed that the case presented a political question inappropriate for judicial resolution.

Justice Thomas concurred in the Court's decision insofar as it prohibited Congress from compelling the Secretary to list Israel as a country of birth on a passport, but saw no problem with Section 214(d)'s similar mandate regarding consular reports of birth abroad. He wrote that the consular reports "were developed to effectuate the naturalization laws," and therefore the regulation of those reports "does not fall within the President's foreign affairs powers, but within Congress' enumerated powers under the Naturalization and Necessary and Proper Clauses." His opinion contained an exceptionally learned and through review of historical practice and commentary on the President's and the Congress's foreign affairs powers, which led him to conclude that the President had full power over recognition of a country's sovereignty for passport purposes, but not for naturalization, which latter topic was for Congress. Justice Thomas also took issue with the assertion in Justice Scalia's opinion, based on the historical experience that the regulation of passports of Section 214(d) was within the competence of Congress. This was a notable instance of disagreement between these two Justices who are generally in accord with the use of original understanding as a tool of Constitutional interpretation.

The Chief Justice joined in Justice Scalia's "principal dissent," which he said "refutes the majority's unprecedented holding in detail," but he stated that he felt compelled to write separately "to underscore the stark nature of the Court's error on a basic question of separation of powers." For Roberts, who had, as indicated, earlier been in a position to defend Presidential power, the majority's decision granting exclusive recognition power to the executive was "a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs." For Roberts, "The Executive may disregard 'the expressed or implied will of Congress' only if the Constitution grants him a power 'at once so conclusive and preclusive' as to 'disabl[e] the Congress from acting upon the subject.'" [quoting from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-638 (Jackson, J. concurring)]. Would you have expected the Chief Justice of the Supreme Court to resist an absolutist reading of executive powers? On the other hand, the Chief Justice rested his dissent, at least in part, on the quite sensible suggestion that "even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statue at issue *does not implicate recognition.*" (emphasis in the original). For Roberts, the designation of the country of birth was an option of the citizen, and not a prerogative of the executive, because it did not actually "alter the longstanding United States position on Jerusalem." Does this make sense?

Scalia's dissent, reviewing the history of Congressional and Executive power reaches a conclusion at odds with that of the majority, and finds that Section 214(d) is a Constitutional exercise of Congress's power to "establish a uniform Rule of Naturalization," Art. I, Section 8, clause 4. As Scalia put it, with typical flair, "It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders." For Scalia, as was true for the Chief Justice the issue was not one of recognition of a foreign government's sovereignty, but of legislative discretion. Who gets that right? In your view is Section 214(d) an invalid invasion of executive prerogative, or an appropriate exercise of Congressional power?

Chapter 4 A LIMITED GOVERNMENT OF ENUMERATED POWER

A. LIMITATIONS ON FEDERAL POWER

4. If Legislative Commerce Power Were Not Enough—Is There Also a Judicial or “Dormant” Commerce Power?

ACO, p. 579; History, p. 385

Insert as Note 3:

3. In *Comptroller of the Treasury of Maryland v. Wynn*, 575 U.S. ____ (2015), The United States Supreme Court held that Maryland’s personal income tax scheme violates the dormant Commerce Clause, consistently with prior rulings that forbade (1) state tax schemes that might lead to double taxation of out-of-state income and that (2) discriminated in favor of intrastate over interstate economic activity. The decision clarified that for dormant commerce clause purposes, it was irrelevant whether the tax was calculated based on gross receipts or net income, or whether the tax was levied against corporations or individuals. The case produced an interesting division among the Justices, with the majority opinion written by Justice Alito, normally a reliable conservative, joined by the Chief justice, and three of the generally liberal Justices, Kennedy, Breyer and Sotomayor. Two conservatives, Scalia and Thomas dissented, as did two liberals, Ginsburg and Kagan. For the majority, the fatal defect in Maryland’s tax scheme was that while Maryland taxes the income its residents earn both within and outside the State, Maryland failed to offer its residents a full credit against the income taxes they pay to other States. The effect of this was to penalize Maryland residents who earned income in other states, thus giving an incentive, as Justice Alito put it, “to opt for intrastate rather than interstate economic activity,” thus violating the prior cases’ prohibitions on double taxation of out of state income and discrimination against interstate economic activity.

Justice Scalia’s dissent was notable for his characteristically pungent statements that “The fundamental problem with our negative [Dormant] Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause.” The Dormant Commerce clause doctrine, for Scalia, should be rejected as a judge-created rule of law inconsistent with the text of the Constitution, as that text “merely empowers Congress to ‘regulate Commerce . . . [and] says nothing about prohibiting state laws that burden commerce.’” For Scalia, the Dormant commerce clause, or, as he insisted on calling it, “the negative Commerce Clause,” was “judicial fraud,” because of the “utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce.” Equally troubling for Justice Scalia, apparently, was his assertion that “our negative Commerce Clause cases have disrupted the balance the Constitution strikes between the goal of protecting commerce and competing goals like preserving local autonomy and promoting democratic responsibility.” “The doctrine,” Scalia explained “does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges.” In a similar

manner, in his separately filed dissent, Justice Thomas stated that “I continue to adhere to my view that the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application and, consequently, cannot serve as a basis for striking down a state statute.” That language of Thomas’s was quoted from his opinion in a prior case, but he added some new words in *Wynne*, that “It seems highly implausible that those who ratified the Commerce Clause understood it to conflict with the income tax laws of their States and nonetheless adopted it without a word of concern.” Scalia and Thomas, then reject the dormant commerce clause doctrine on both textual and historical grounds. Is this convincing?

Justice Ginsburg’s dissent, joined in by Justices Scalia and Kagan, made the even simpler point that prior decisions of the Court had repeatedly acknowledged that “A nation or State ‘may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.’” (Emphasis in original, quoting from *Oklahoma Tax Comm’n v. Chicasaw Nation*, 515 U.S. 450, 462-463 (1995)). For Ginsburg, it was permissible, but not required, for a state to offer their residents credits for income taxes paid to other States, but this was a decision of tax “policy” and “not because the Constitution compels that course.” Can you understand why Scalia joined in that dissent? Is Ginsburg evidencing a conservative strain of Constitutional jurisprudence, a penchant for federalism, or do you suppose something else is involved? Could a clue be provided by Ginsburg’s comment, later in her dissent that “I see no reason why the Constitution requires us to disarm States from using a progressive tax, rather than a flat toll, to cover the costs of local services all residents enjoy”?

Chapter 7 A GOVERNMENT COMMITMENT TO FREEDOM

A. FIRST AMENDMENT SPEECH

6. Special Contexts

a. Government Speech

ACO, p. 982; Individual Rights, p. 466

Insert at the end of Note 5, page 982

In 2015 there seemed to be an accelerating trend to remove the Confederate Battle flag from state and local offices and grounds, as that flag was increasingly perceived as symbolizing a defense of slavery. In *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. ____ (2015), the Court reviewed the decision of the Texas Department of Motor Vehicles to reject a proposal to issue a specialty Texas license plate featuring the battle flag. The question before the Court was whether the Department's rejection amounted to constitutionally forbidden viewpoint discrimination. The Court held that Texas's specialty license plates constituted "government speech," and thus Texas was entitled to refuse to issue plates which conveyed a message with which the Department did not want to be associated.

The plates, said the majority, constituted government speech because the name "Texas" appeared on each plate, Texas vehicle owners were required to display Texas plates, and Texas, through the department, controlled the messages on its plates. Thus, for the majority, the license plates were the same sort of governmental speech as exemplified by the monument involved in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and that just as Pleasant Grove was not obligated to erect all monuments proposed by private groups, so could the Texas Department choose which messages it wished to convey and which ones it did not. While Texas could not require individuals or groups to convey "the State's ideological message," the plaintiffs in the case could not force Texas to include the Confederate battle flag on specialty plates, and the Department's decision based on the fact that "many members of the general public" found the design featuring the Confederate battle flag offensive, was a reasonable and permissible one.

Justice Breyer's majority opinion was joined by Thomas, Ginsburg, Sotomayor, and Kagan, while Justice Alito wrote a dissenting opinion in which Roberts, Scalia, and Kennedy joined. Justice Alito's dissent began with the proposition that "The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing." In his view this was a blatant case of favoring one speaker over another, and thus impermissible under cases such as *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). Was the dissent correct? Which was the proposed Confederate battle flag – government speech or private speech? How, precisely, should the distinction be made?

Alito noted that there were more than 350 varieties of Texas specialty plates, including designs which bore the name of colleges, universities, high schools, fraternities or sororities, the Masons, the Knights of Columbus, and the Daughters of the American Revolution, a realty company, a favorite soft

drink, a favorite burger restaurant, and a favorite NASCAR driver. Alito asked, “As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars?” How would you answer his question? Is the Texas specialty plate, for which Texas charged a significant fee, the provision of a public forum for private speech, or was it a manifestation of the views of the state of Texas? Was the majority in *Walker* engaging in impermissible viewpoint discrimination?

c. Speech Within Private Associations

ACO, p. 1040; Individual Rights, p. 524

Insert after note 16:

One of your co-editors, the Ambassador, decided to run for Congress as an independent to express his disagreement with the entire line of campaign spending cases beginning with *Buckley v. Valeo*. Ambassador Kmiec ran as an independent to articulate his disappointment with both parties and to highlight his refusal to “sell himself” to the lobbyists on K Street, something congressional candidates have to do regularly now because, in the Ambassador’s dissenting view to that prevailing on the Court, the Court has drawn a false analogy between money and speech. Of course, the Ambassador reasons Congress may not limit the amount of anyone’s actual speech or to censor on the basis of content, but if money is speech, that means that money, too, is made near impossible to limit. Congress and the states ought to see what results: ever more money is needed to run for public office, and that makes public service the province of the wealthy. In the Ambassador’s district, he had the endorsement of farm workers and social justice organizations, as well as a healthy number of middle class citizens who exercise their First Amendment rights of speech and association through Rotary, Lion’s Club, and similar activities. He also appealed to a homeless man, who the Ambassador found sleeping in his car at a fancy shopping center he had patronized before losing his business, and then via foreclosure, his home in the financial downturn on 2008. Unfortunately for the Ambassador, trying to win a Congressional seat this way proved to be an unworkable electoral strategy: many of the farmworkers were ineligible to vote and his homeless friends found making it to the polls a bit difficult. And even among middle class voters, there was considerable disinterest expressed by an historically low turnout and increasing indifference among all ages, ethnicities and genders to even registering to vote. The incumbent raised \$1.5 million for her campaign; Ambassador Kmiec raised under \$20,000 and gave “left over” money to the social justice fund. The incumbent is still the incumbent.

“I wanted to see if Mr. Smith actually could go to Washington,” the Ambassador proclaims to his friends and students, referencing a vintage Frank Capra movie starring Jimmy Stewart, as a boy ranger leader suddenly appointed to the U.S. Senate and discovering that wholesome values of patriotism and citizenship were being sacrificed to self-interest and venality. “Sadly,” concluded the Ambassador, “my experience as a candidate suggests that at present, ‘Mr. Smith’ is only welcome to go to Washington as a

tourist. Citizens see that the needs and wants of the wealthy dominate the political process, and if this is not checked, the Ambassador believes that given the heightened concern with income inequality, there will be increased anger at Congress whenever it accomplishes very little, and especially when, even worse, it consistently fails to address the interests of the middle class family — e.g., meeting tuition, housing, medical and food bills.” The law here is wholly the gloss of the Supreme Court and it has largely immunized from regulation, spending done by the candidate or that said to be — at least mythically — without coordination with the candidate or the candidate’s campaign.

During his run for office, the Supreme Court managed to find a way to remove a cap on aggregate spending. In *McCutcheon v. Federal Election Comm’n*, 572 U.S. ___, 134 S. Ct. 1434 (2014), the Court held unconstitutional a provision of the Federal Election Campaign Act of 1971, as amended in the Bipartisan Campaign Reform Act of 2002, that limited campaign contributions. The challenged provision limited “how much money a donor may contribute in total to all candidates or committees,” and was known as the aggregate limits. The statute allowed a person to contribute an aggregate amount of “up to \$123,200 to candidate and non-candidate committees during each two year election cycle.” McCutcheon claimed he wanted to contribute money to additional candidates but was barred by the aggregate limits provision. The Court did not revisit the distinction between contributions and expenditures evoked in *Buckley*, concluding that “[b]ecause we find a substantial mismatch between the Government’s stated objective and the means selected to achieve it, the aggregate limits fail even under the ‘closely drawn’ test.” After declaring inapposite “three sentences” on the subject in *Buckley*, the Court held “the aggregate limits prohibit an individual from fully contributing to the primary or general election campaigns of ten (10) or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption.”

The government’s interest in the “prevention of corruption or the appearance of corruption” was insufficient. The Court first noted that this governmental interest was more specifically the interest in preventing “a specific type of corruption — ‘*quid pro quo*’ corruption.” Gaining influence or greater access to public officials was not a constitutionally sufficient interest, nor was the prevention of “[s]pending large sums of money in connection with elections, [which was not] an effort to control the exercise of an officeholder’s official duties.”

ACO, p. 1041; Individual Rights, p. 525

Insert after note 18:

Harris v. Quinn, 573 U.S. ___, 134 S. Ct. 2618 (2014). The issue, according to the Court, was “whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support.” It concluded that the First Amendment did not so permit. The federal Medicaid program permits states that operate programs that provide in-home services to those unable to live at home without assistance to receive reimbursement for the costs associated with the home personal care. Illinois (like most other states) created such a program, called a Rehabilitation Program. Under this program, the person in need of personal care, called the “customer,” may hire a personal assistant, often a family member. The personal assistant is paid by the

state, which is reimbursed through Medicaid. Even if the personal assistant who provides personal care is a family member, Illinois law declares that the customer and the personal assistant are employer and employee. In 2003, Illinois adopted a law making personal assistants public employees, but only for the purpose of organizing collectively to bargain on wages and benefits. Illinois law authorizes public employees to join labor unions which engage in collective bargaining for its members. After it made personal assistants public employees for this bargaining purpose, SEIU Healthcare Illinois & Indiana (SEIU-HII), pursuant to a vote of personal assistants, was made the exclusive agent of personal assistants for the purpose of collective bargaining. A public employee who does not want to join the union is required to pay an agency fee to the union that reflects the employee's share of the costs of collective bargaining. This fee is deducted from the employee's paycheck and paid to the union. Illinois and SEIU-HII agreed that all personal assistants who were not members of SEIU-HII were required to pay an agency fee.

Several personal assistants sued for an injunction prohibiting enforcement of the agency fee agreement and for an order declaring the law violates the First Amendment by compelling them to pay a fee to a union they do not want to join. In holding the Illinois law unconstitutional on First Amendment grounds, the Court looked at both its 2012 decision in *Knox v. Service Employees* and *Abood v. Detroit Bd. of Educ.* After strongly criticizing the Court's reasoning in *Abood*, it held *Abood* inapplicable to the personal assistants who were public employees solely for the purpose of collective bargaining. It then relied on the conclusion in *Knox* that an agency fee requirement creates “‘a significant impingement on First Amendment rights,’ and this cannot be tolerated unless it passes ‘exacting First Amendment scrutiny.’” The Court then held that the agency fee requirement imposed on personal assistants did not pass the *Knox* standard. The Court concluded by declaring its decision was consonant with both *Keller v. State Bar of California* and the following primary case, *Board of Regents of the University of Wisconsin System*.

Chapter 8 A GOVERNMENT COMMITMENT TO EQUALITY

A. RACE

4. Proving Discriminatory Intent

ACO, p. 1170; Individual Rights, p. 654

Insert the following at the end of Note 3:

In *Texas Dep't of Housing and Community Affairs v. Inclusive Community Project, Inc.*, 135 S. Ct. 2507 (2015), the Court considered whether the Fair Housing Act of 1968 allowed for disparate impact claims in addition to disparate treatment/intentional discrimination claims. Relying on its pre-*City of Boerne* cases interpreting Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act of 1967 as including disparate impact claims, the Court held that the Fair Housing Act likewise included disparate impact claims. It made no mention of *City of Boerne*, and neither did either of the two dissents. Instead, Justice Thomas challenged the legitimacy of the initial disparate impact holding in *Griggs v. Duke Power* (1971) itself, contending that the entire enterprise was the result of a “creative interpretation” by lawyers at the Equal Employment Opportunity Commission who chose “to defy Title VII’s restrictions [to intentional discrimination claims] and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent.” And Justice Alito focused in his dissent on the statutory language of the Fair Housing Act, noting that the phrase, “because of” race, required as a statutory matter discriminatory intent, not just disparate impact. Nonetheless, Justice Kennedy’s opinion for the Court did make an implicit nod to *City of Boerne*, noting, for example, that “disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.” He also added “that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution.” “Remedial orders in disparate-impact cases,” he advised, “should concentrate on the elimination of the offending practice that arbitrarily operates invidiously to discriminate on the basis of race.” “Remedial orders that impose racial targets or quotas,” he warned, “might raise more difficult constitutional questions.” In other words, should statutorily-grounded disparate impact claims go too far beyond remedying constitutional violations, they might well be unconstitutional under *City of Boerne* and perhaps under *Adarand Constructors, Inc. v. Peña*, taken up in the next section. One suspects that, in light of Justice Kennedy’s caveats, we have not seen the last of this issue; indeed, the Supreme Court has already agreed to rehear an affirmative action case next term, *Fisher v. University of Texas at Austin*.

B. NUMERICAL EQUALITY—ONE PERSON/ONE VOTE

ACO, p. 1256; Individual Rights, p. 739

Delete *Bush v. Gore*, or greatly summarize it for your students given its murky, one-time rationale per curium and substitute the following:

In *Arizona State Legislature v. Arizona Independent Redistricting Commission, Inc.*, 576 U.S. ____ (2015), the court clarified the law regarding legislative standing, and held that the Arizona Legislature had standing to challenge a voter initiative, Proposition 106, which stripped the legislature of its alleged constitutional prerogative to engage in redistricting for the purposes of elections to Congress. Proposition 106 provided for redistricting by utilizing an independent commission procedure provided for in the Arizona Constitution. The suggestion that the legislature was deprived of a state constitutionally-conferred power, said the Court, was a showing of injury that was “concrete and particularized,” and “actual or immanent,” “fairly traceable to the challenged action,” and “redressable by a favorable ruling.” These factors, according to the majority met the requirements for the recognition of standing to the Legislature for a lawsuit to challenge the initiative. Nevertheless, rejecting the challenge, the Court held that where the state constitution provided for the initiative as a means of lawmaking, there was nothing stopping that lawmaking from including redistricting.

The Court emphasized that the “animating principle” of the Constitution was that “the people themselves are the originating source of all the powers of government,” and where the people of Arizona decided that redistricting was better placed in the hands of an independent Commission, this was a valid exercise of state legislative sovereignty. Do you understand why the people of a state might wish to remove the power of redistricting from their legislature? Is the grant of standing to the legislature to challenge a popular initiative consistent or inconsistent with the initiative’s exercise of popular sovereignty? The majority was composed of the four liberals, with Anthony Kennedy, the swing Justice, joining them. The conservatives, Roberts, Scalia, Thomas, and Alito all dissented.

The Constitution’s Election Clause, Article I, Section 4, cl. 1, provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” In effect, then, the majority in the case held that “the Legislature” as that term was used in the Constitution meant “the people” exercising the initiative process. Was this the correct reading of the Constitution? The Chief Justice, in his dissent (joined by Scalia, Thomas, and Alito) observed that The Seventeenth Amendment transferred power to choose United States Senators from “the Legislature” of each State to “the people thereof.” “The Amendment,” he noted, “resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States.” “What chumps!” exclaimed the Chief. “Didn’t they realize that all they had to do was interpret the constitutional term ‘the Legislature’ to mean ‘the people’?” The majority, he explained, had performed “just such a magic trick with the Elections Clause.” Was he right?

Justice Scalia, joined by Justice Thomas filed a separate dissent indicating his belief that “Disputes between governmental branches or departments regarding the allocation of political power do not constitute ‘cases’ or ‘controversies’ committed to our resolution by Art. III, Section 2 of the Constitution.” Accordingly, it was his belief that the Arizona legislature should not have been granted standing to bring a proceeding in federal District Court, because their grievance was not that of individuals, but rather was a suit “between units of government regarding their legitimate powers.” This dispute, for Scalia (and Thomas) was not one “appropriately resolved through the judicial process.” Standing for Scalia was not a matter to be decided by invocation of the factors the majority considered, but rather was a matter to be decided in accordance with the basic principle of separation of powers which kept matters before the courts limited to those involving individuals aggrieved by governmental action, and not those that involved “direct disputes between two political branches of the same government regarding their respective powers.” Given the Court’s prior jurisprudence on standing, was Scalia correct? Why did the majority strike out in the direction it did?

D. SEXUAL ORIENTATION

ACO, p. 1295-1301; Individual Rights, p. 778-804

Delete Section D. Sexual Orientation on pages 1295-1301

In light of the unusual equal protection analysis supplied by Justice Kennedy in *Obergefell v. Hodges*, *infra*, ask students after they read *Obergefell* to consider and answer the questions in the Notes and Questions on ACO pages 1301-03, Individual Rights pages 784-86.

ACO, p. 1303; Individual Rights, p. 786

Delete *U.S. v. Windsor*

Chapter 9 A GOVERNMENT OF IMPERFECT KNOWLEDGE — OF INKBLOTS, LIBERTY AND LIFE ITSELF

B. THE NINTH AMENDMENT—A RIGHT OF PRIVACY?

4. Homosexual Conduct

ACO, p. 1454; Individual Rights, p. 938

Delete *Lawrence v. Texas*

Insert the following decision:

OBERGEFELL v. HODGES

__U.S.__ (2015)

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. 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 Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

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. . . . 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. . . .

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are

considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, (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. See *Goodridge v. Department of Public Health*, (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States*

v. *Windsor* (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, *Citizens for Equal Protection v. Bruning*, (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.

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. See *Duncan v. Louisiana*, (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, (1972); *Griswold v. Connecticut*, (1965).

* * *

History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed. Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” . . . Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.

It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents.

* * *

This 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. . . . Indeed, the Court has noted it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it 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.”

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such pro- found choices.

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, 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.”

* * *

Marriage responds to the universal fear that a lonely person might call out only to find no one

there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

* * *

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Marriage also affords the permanency and stability important to children’s best interests.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

“There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . [H]e afterwards carries [that image] with him into public affairs.”

In *Maynard v. Hill*, (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. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, (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.

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.

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 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 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. (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).

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents’ States to await further public discussion and political measures before licensing same-sex marriages.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities— have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. . . . Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, (CA10 2014) (“[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex

marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

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) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. 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.

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?

* * *

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

* * *

A

* * *

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.

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.” J. Q. Wilson, *The Marriage Problem* 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at “the time of the Nation’s founding [marriage] was understood to be a voluntary contract between a man and a woman.” *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between “husband and wife” as one of the “great relations in private life,” and philosophers like John Locke, who described marriage as “a voluntary compact between man and woman” centered on “its chief end, procreation” and the “nourishment and support” of children.

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with “[t]he whole subject of the domestic relations of husband and wife.” There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as

“the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children.”

* * *

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant’s separate status. Racial restrictions on marriage, which “arose as an incident to slavery” to promote “White Supremacy,” were repealed by many States and ultimately struck down by this Court.

The majority observes that these developments “were not mere superficial changes” in marriage, but rather “worked deep transformations in its structure.” They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, “Marriage is the union of a man and a woman, where the woman is subject to coverture.” The majority may be right that the “history of marriage is one of both continuity and change,” but the core meaning of marriage has endured.

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 all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex

couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic “momentum” in favor of “expand[ing] the definition of marriage to include gay couples,” but concluded that petitioners had not made “the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.” That decision interpreted the Constitution correctly, and I would affirm.

II

* * *

The majority purports to identify four “principles and traditions” in this Court’s due process precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. 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

* * *

Allowing unelected federal judges to select which unremunerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sanford*, (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.”

* * *

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*.

* * *

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.

* * *

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

* * *

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.”

* * *

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.* 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

* * *

The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.

* * *

One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would

otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State “doesn’t have such an institution.” But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

* * *

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*.

* * *

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.” G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, *Constitutional Law* 453 (7th ed. 2013). The majority’s approach today is different:

“Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought

to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, (2009). 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*, 539 U. S., at 585 (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 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.”

* * *

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.

* * *

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 fair-minded 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.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE’S opinion in full. I write separately to call attention to this Court’s threat to American democracy.

The substance of today’s decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.

Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.

. . .

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.⁷ Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.⁸

The Constitution places some constraints on self-rule— constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws “impairing the Obligation of Contracts,”⁹ denying “Full Faith and Credit” to the “public Acts” of other States,¹⁰

⁷ Brief for Respondents in No. 14–571, p. 14.

⁸ Accord, *Schuetz v. BAMN*, 572 U. S. , – (2014) (plurality opinion) (slip op., at 15–17).

⁹ U. S. Const., Art. I, §10.

¹⁰ Art. IV, §1.

prohibiting the free exercise of religion,¹¹ abridging the freedom of speech,¹² infringing the right to keep and bear arms,¹³ authorizing unreasonable searches and seizures,¹⁴ and so forth. Aside from these limitations, those powers “reserved to the States respectively, or to the people”¹⁵ can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.”¹⁶

“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”¹⁷

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.¹⁸ We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect.¹⁹ That is so because “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did

¹¹ Amdt. 1.

¹² *Ibid.*

¹³ Amdt. 2.

¹⁴ Amdt. 4.

¹⁵ Amdt. 10.

¹⁶ *United States v. Windsor*, 570 U. S. , (2013) (slip op., at 16) (internal quotation marks and citation omitted).

¹⁷ *Id.*, at _____ (slip op., at 17).

¹⁸ See *Town of Greece v. Galloway*, 572 U. S. , – (2014) (slip op., at 7–8).

¹⁹ *Ante*, at 10.

not presume to know the extent of freedom in all of its dimensions”²⁰ One would think that sentence would continue: “. . . and therefore they provided for a means by which the People could amend the Constitution,” or perhaps “. . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.” But no. What logically follows, in the majority’s judge-empowering estimation, is: “and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”²¹ The “we,” needless to say, is the nine of us. “History and tradition guide and discipline [our] inquiry but do not set its outer boundaries.”²² Thus, rather than focusing on *the People’s* understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, *in the majority’s view*, prohibit States from defining marriage as an institution consisting of one man and one woman.²³

* * *

II

* * *

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.²⁴ 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.”²⁵ (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.”²⁶ (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

²⁰ *Ante*, at 11.

²¹ *Ibid*.

²² *Ante*, at 10-11.

²³ *Ante*, at 12-18.

²⁴ If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

²⁵ *Ante*, at 13.

²⁶ *Ante*, at 19.

and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.”²⁷ (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.

* * *

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.

I

* * *

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of “substantive” or “procedural” due process—a party must first identify a deprivation of “life, liberty, or property.” The majority claims these state laws deprive petitioners of “liberty,” but the concept of “liberty” it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

A

1

* * *

²⁷ *Ibid.*

Even assuming that the “liberty” in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

* * *

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L. J.* 907, 918–919 (1993). As one later commentator observed, “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power.” J. Reid, *The Concept of Liberty in the Age of the American Revolution* 56 (1988). Or as one scholar put it in 1776, “[T]he common idea of liberty is merely negative, and is only the *absence of restraint*.” R. Hey, *Observations on the Nature of Civil Liberty and the Principles of Government* §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals “from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth.” Downer, *A Discourse at the Dedication of the Tree of Liberty*, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define “liberty” as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of “liberty,” that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of

marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of “liberty,” they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State’s *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of “liberty” that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, “The first society was between man and wife, which gave beginning to that between parents and children.” Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding “that to the institution of marriage the true origin of society must be traced”). Petitioners misunderstand the institution of marriage when they say that it would “mean little” absent governmental recognition.

Petitioners’ misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of “liberty” beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.²⁸ They were

²⁸ The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. “America’s earliest laws against interracial sex and marriage were spawned by slavery.” P. Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 19 (2009). For instance, Maryland’s 1664 law prohibiting marriages between “‘freeborne English women’” and “‘Negro Sla[v]es’” was passed as part of the very act that authorized lifelong slavery in the colony. *Id.*, at 19–20. Virginia’s antimiscegenation laws likewise were passed in a 1691 resolution entitled “An act for suppressing outlying Slaves.” Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (*italics deleted*). “It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy.” Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire “to increase the likelihood that

each sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.²⁹ In a similar vein, *Zablocki v. Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner v. Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners’ misconception of liberty, the majority characterizes petitioners’ suit as a quest to “find . . . 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.” *Ante*, at 2. But “liberty” is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority’s “better informed understanding of how constitutional imperatives define . . . liberty,” *ante*, at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a “collection of ‘Thou shalt nots,’ ” *Reid v. Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not “Thou shalt provides.”

III

The majority’s inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

* * *

B

Aside from undermining the political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect.

children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.” *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

²⁹ The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment’s Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia*, O.T. 1966, No. 395, pp. 12–16.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, “America was in the wake of a great religious revival” marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, e.g., Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting that States—have cautioned the Court that its decision here will “have unavoidable and wide-ranging implications for religious liberty.” Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation’s tradition. Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.³⁰

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood,

³⁰ Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20–60 (1960).

the majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples. *Ante*, at 3, 13, 26, 28.³¹ The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority’s musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State. Today’s decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible understanding of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

³¹ The majority also suggests that marriage confers “nobility” on individuals. *Ante*, at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more “noble” than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.³² 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.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that “liberty” under the Due Process Clause should be understood to protect only those rights that are “‘deeply rooted in this Nation’s history and tradition.’” *Washington v. Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U. S. ___, (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

“In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

“What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.” *Id.*, at ____ (slip op., at 7–8) (footnote omitted).

For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental

³² I use the phrase “recognize marriage” as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.³³ This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

³³ See, e.g., Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Non-marital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/data_brief/db18.pdf.

As I wrote in *Windsor*:

“The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

“We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

“At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.” 570 U. S., at (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

III

Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Notes and Questions

1. Is this opinion anchored in due process or equal protection? What difference would it make?
2. After this opinion, what protection is there for dissenting views held as sincere religious belief?
3. As asked in the introduction to this supplement, why isn't the imposition under law of either traditional marriage exclusively or same sex marriage and traditional marriage, the unconstitutional favoritism of one faith belief over another – that is, an unlawful establishment?
4. Isn't the adoption under law of either conception of marriage unnecessary for the limited purpose of the state to run inheritance laws, facilitate the private care of others to limit public expenditure, etc.? Couldn't the state just require a civil administrative declaration of ownership or obligation of care to others to whom we wish to be related by secular, civil law (in addition to the obligations of care that are derived from status such as that of a parent).

5. People of faith often attribute the definition of marriage to God; if so, why is the state in this business of marriage definition at all?

Insert the materials in Questions 5 & 6 on ACO page 1318-19; Individual Rights 801-02 here.

7. If the state stays in the marriage business does it have a constitutional obligation to supply a religious exemption from any civil rights protection of the state conception of marriage? Are the federal and state governments treated differently in terms of constitutional obligation? Or are the differences merely the different statutory obligations that are voluntarily undertaken by the several states?

8. Should the availability of exemption turn on whether the religious practice sought to be made exempt has the capacity to impose a harm on another's dignity? For example, Catholic theology opposes either the formal or material complicity in the sins of another, whether or not the other is engaged in the sinful activity. If a cake maker refuses to bake for same sex couples is that a necessary outcome of the theology of complicity? Or are cakes too far removed from any coercion of belief? But who is to say what is or is not too remote? If it is other than the person's pastor, minister etc. is that a lesser claim or are we then entangled in ways the establishment clause says we must avoid?