CONSTITUTIONAL LAW

A CONTEXT AND PRACTICE CASEBOOK

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2016 SUPPLEMENT

David S. Schwartz
University of Wisconsin Law School
Foley & Lardner-Bascom Professor of Law

Lori A. Ringhand
University of Georgia Law School
J. Alton Hosch Professor of Law

Carolina Academic Press
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

2016 SUPPLEMENT – CHAPTER 1: LEGISLATIVE POWER

C. The Commerce Clause

4. The Modern Era: the Commerce Clause Since 1995

Insert at p. 148, after RQE #8:

9. The *McCulloch*/implied powers argument for the individual mandate (see RQE #5) is that something that is not interstate commerce can be regulated if doing so is necessary to make an interstate commerce regulation effective. Chief Justice Roberts rejects this argument in NFIB. On what grounds? Consider whether his position on the individual mandate in NFIB is consistent with the following case, *King v. Burwell*, decided this past term.

CASE NOTE: King v. Burwell, 135 S. Ct. 2480 (2015). King *was yet another challenge that threatened to unravel the Affordable Care Act, but this time on statutory interpretation grounds. The ACA was originally drafted on the assumption that all states would establish and operate health insurance exchanges—the online marketplaces through which consumers could shop for health insurance whose terms and prices would conform to the ACA's directives. But at some point during the process, it was determined that states should be permitted to opt out of this role, in which case the federal government would establish and operate the exchanges as a fallback. (This statutory form is an example of "conditional commerce" regulation discussed in the "Cooperative federalism" note at p. 175 of the textbook.) Apparently, not all of the relevant sections of the 900 page statute were revised to reflect this change. One of those was a critically important section which offered tax credits to low income individuals and families to purchase health insurance. The Act provides that tax credits "shall be allowed" for any "applicable taxpayer," 26 U.S.C. § 36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U.S.C. § 18031]." After enactment of the ACA, some 36 states opted out of establishing health insurances exchanges, so that the federal department of Health and Human Servises (HHS) wound up operating these exchanges. In order to clarify that low income persons in these states with federally-run exchanges will still receive the tax credits, the IRS issued a regulation interpreting the statutory language as making tax credits available on "an Exchange," "regardless of whether the Exchange is established and operated by a State ... or by HHS." 45 CFR § 155.20.*

The challengers to the ACA argued that the IRS regulation violated the plain language of the statute, which they asserted should be interpreted to deny tax credits to the millions of low income people who would have qualified for them in the 36 states with HHS-run exchanges. A six justice majority (***Roberts*** (CJ), Kennedy, Ginsburg,

Breyer, Sotomayor, and Kagan) rejected this argument. Writing for the majority, Roberts argued that the plain intent of the statute was to offer the tax credits to all qualified low income people, regardless of which level of government ran the health exchange.

> Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

Justices Scalia wrote a dissent, joined by Justices Thomas and Alito.

Although this case was argued and decided on statutory interpretation, rather than constitutional grounds, we believe parts of the opinion are highly pertinent. We focus specifically on Chief Justice Roberts' factual description of the Affordable Care Act. As you read the following excerpt of Chief Justice Roberts' majority opinion, consider the following question: what light does this factual description shed on whether the individual mandate is regulation of interstate commerce? That, after all, was the conclusion of five justices in *NFIB v. Sebelius*, including Chief Justice Roberts, who argued that position at length.

> CHIEF JUSTICE ROBERTS: The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market regulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.
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> The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.
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> This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.
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> This cycle happened repeatedly during the 1990s. For example, in 1993, the State of Washington reformed its individual insurance market by adopting the guaranteed issue and community rating requirements. Over the next three years, premiums rose by 78 percent and the number of people enrolled fell by 25 percent. By 1999, 17 of the State's 19 private insurers had left the market, and the remaining two had announced their intention to do so. Brief for America's Health Insurance Plans as Amicus Curiae 10–11.
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> For another example, also in 1993, New York adopted the guaranteed issue and community rating requirements. Over the next few years, some major insurers in the individual market raised premiums by roughly 40 percent. By 1996, these reforms had

"effectively eliminated the commercial individual indemnity market in New York with the largest individual health insurer exiting the market."

In 1996, Massachusetts adopted the guaranteed issue and community rating requirements and experienced similar results. But in 2006, Massachusetts added two more reforms: The Commonwealth required individuals to buy insurance or pay a penalty, and it gave tax credits to certain individuals to ensure that they could afford the insurance they were required to buy. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—reduced the uninsured rate in Massachusetts to 2.6 percent, by far the lowest in the Nation. Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform before the Senate Committee on Health, Education, Labor, and Pensions, 111th Cong., 1st Sess., 9 (2009).

B

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual ... market in a State must accept every ... individual in the State that applies for such coverage." 42 U.S.C. § 300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. § 300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. 26 U.S.C. § 5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." Ibid. In Congress's view, that coverage requirement was "essential to creating effective health insurance markets." Ibid. Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B. Individuals who meet the Act's requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual's insurer. 42 U.S.C. §§ 18081, 18082.

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. § 18091(2)(I). And the coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement. Given the relationship between these three reforms, the Act provided that they should take effect on the same day—January 1, 2014.

F. The Civil War Amendments

2. The Enforcement Clauses and the Eleventh Amendment

Insert at p. 259, after the Kimel *and* Hibbs *review questions and immediately before Section G*

5. Does the congruence and proportionately test apply in *all* enforcement clause cases?

You may recall the first case in this unit, *Katzenbach v. Morgan,* involved the constitutionality of part of the Voting Rights Act of 1965. *Katzenbach*, of course, adopted a relatively permissive standard of review for such legislation. Citing *McColloch v. Maryland,* the Court said it would uphold efforts to protect voting rights as long as Congress's effort to do was "plainly adapted" to a "legitimate end." Other cases, upholding different parts of the Voting Rights Act under the enforcement provision of the Fifteenth Amendment, also used this relatively permissive standard.

As you have seen, however, subsequent cases adopted the more demanding congruence and proportionality test articulated in *City of Boerne* and developed in cases like *Kimel.* None of these subsequent cases purported to overturn *Katzenbach* or the other voting rights cases, but they unquestionably imposed a higher burden on Congress to justify use of its enforcement clause powers. Was the difference between the voting rights cases and those later cases simply an example of opportunistic doctrinal evolution, in which the Court used the case presented to develop its understanding of scope of the enforcement provisions, or did the Court *intend* to leave the more lenient standard of *Katzenbach* in place for *certain types* of statutes– namely, for statutes addressing the race-related voting problems sitting squarely in the combined heart of the Fourteenth and Fifteenth Amendments?

For years, commentators debated this question. Those arguing that the standards were intended to be different noted that the Court has long recognized the centrality of race to the Civil War Amendments, and that this fact, as well as the specificity of the voting rights protected by the Fifteenth Amendment, justified giving Congress more discretion when drawing statutes intended to remedy problems involving race and voting. Those on the other side of the debate argued that separate standards would make little sense doctrinally, and that the Court would unify the standards as soon an appropriate voting rights case came along.

The opportunity to do just that arrived in 2013, when the Court decided *Shelby County v. Holder*. *Shelby County* challenged the constitutionality of a part of the Voting Rights Act that required certain states with a history of racial discrimination in voting to "pre-clear" most changes to voting rules or regulations before they were allowed to take effect. The question presented in the case was whether the preclearance requirement exceeded Congress's enforcement clause powers. Many observers thought the Court would take the opportunity presented by *Shelby County* to clarify whether the congruence

and proportionately test applied to voting rights cases as well as to those arising solely under the Equal Protection clause of the Fourteenth Amendment.

The Court did not do so. The majority opinion, written by Chief Justice Roberts, invalidated the statutory formula used to determine which states were subjected to the preclearance requirement, but did not resolve the standard of review question. Instead, the Court said this:

> The Constitution and laws of the United States are "the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to. … More specifically, "'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Gregory* v. *Ashcroft*, 501 U. S. 452, 461–462 (1991). …
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> Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin*, *supra*, at 203 (citing *United States* v. *Louisiana*, 363 U. S. 1, 16 (1960). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle* v. *Smith*, 221 U. S. 559, 567 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.,* at 580. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. 383 U. S., at 328–329. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.
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> The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C." *Id.*, at 202. … And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). … All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach.* We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez*, 525 U. S., at 282, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 500–501 (1992). As we reiterated in *Northwest Austin*, the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." …
>
> The Government suggests that *Katzenbach* sanctioned [the approach used by Congress to determine which states were subjected to preclearance under the VRA] but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the

> coverage formula was rational because the "formula . . . was relevant to the problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." Here, by contrast, the Government's reverse engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin*, *supra,* at 211—that failure to establish even relevance is fatal. …
>
> In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to non covered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach*, *supra*, at 308, 315, 331; *Northwest Austin*, 557 U. S., at 201.
>
> But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on "second generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

What standard of review is the Court using here? Is the problem with the statute that the coverage formula is "irrational"? That it is not congruent and proportionate to "current conditions"? Or that the "fundamental principle of equal sovereignty" and the "extraordinary nature" of the preclearance requirement impose an even *higher* burden on Congress than does the *City of Boerne* test? If the later, where does this "fundamental principle" come from?

* * *

H. The Treaty Power

[For inclusion following *Missouri v. Holland*, p. 258.]

The following case, *Bond v. United States*, promised to be the first major decision under the treaty power since *Missouri v. Holland*, in 1920. As will be seen, the majority decided to construe the statute as not covering the defendant Bond's conduct; this result avoided the constitutional question.

However, three justices concurred in the judgment reversing the defendant's conviction on the ground that the statute was unconstitutional because it exceeded the treaty power. The reasoning in the dissent is noteworthy and potentially important. The majority opinion is interesting as an application of the "doctrine of constitutional avoidance" and statutory clear statement rules, which may have important federalism implications in future cases.

This was the second time that Carol Anne Bond's case reached the Supreme Court. The first time produced the opinion in Bond v. United States excerpted in Chapter 1, section D.2. We label this second bond case "Bond II" for ease of reference.

Guided Reading Questions: *Bond v. United States (Bond II)*

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1. This case involves two related questions: (1) a statutory interpretation question over the meaning of "chemical weapons" to determine whether the statute was intended to apply to Bond's conduct; and (2) a constitutional question about whether the statute was "necessary and proper" to the Treaty Power. The majority decides issue (1) in a way that makes it unnecessary to reach issue (2). Be sure that you understand why it became unnecessary to reach issue (2) in the majority's resolution.

2. Still focusing on issue (1): The majority gives a narrow reading to the term "chemical weapons," or at least a reading narrow enough to exclude the use of a chemical as a weapon in an assault upon another person. Is the reading *unduly* narrow? How does the majority justify the narrow reading? What is the Scalia opinion's disagreement on this point?

3. Explain why the separate opinions "concur in the judgment" rather than dissent.

4. Try to articulate Scalia's argument on the extent of the treaty power.

5. Thomas and Alito agree with one another, but do not join Scalia's argument on the constitutional question (section II of his opinion). How do they differ with Scalia?

Bond v. United States,
572 U.S. __, 134 S. Ct. 2077 (2014)

Majority: ***Roberts*** (CJ), Kennedy, Ginsburg, Breyer, Sotomayor, And Kagan,

Concurrence in the judgment: ***Scalia, Thomas, Alito*** (omitted)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The horrors of chemical warfare …. during World War I…. led to an overwhelming consensus in the international community that toxic chemicals should never again be used as weapons against human beings. Today that objective is reflected in the international Convention on Chemical Weapons, which has been ratified or acceded to by 190 countries. The United States, pursuant to the Federal Government's constitutionally enumerated power to make treaties, ratified the treaty in 1997. To fulfill the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The Act makes it a federal crime for a person to use or possess any chemical weapon, and it punishes violators with severe penalties. It is a statute that, like the Convention it implements, deals with crimes of deadly seriousness.

The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

In 1997, the President of the United States, upon the advice and consent of the Senate, ratified the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. S. Treaty Doc. No. 103–21, 1974 U.N.T.S. 317. The nations that ratified the Convention (State Parties) had bold aspirations for it: "general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction." Convention Preamble, ibid. This purpose traces its origin to World War I, when "[o]ver a million casualties, up to 100,000 of them fatal, are estimated to have been caused by chemicals ..., a large part following the introduction of mustard gas in 1917." The atrocities of that war led the community of nations to adopt the 1925 Geneva Protocol, which prohibited the use of chemicals as a method of warfare.

Up to the 1990s, however, chemical weapons remained in use both in and out of wartime, with devastating consequences…. The Convention was conceived as an effort to update the Geneva Protocol's protections and to expand the prohibition on chemical weapons beyond state actors in wartime.

Although the Convention is a binding international agreement, it is "not self-executing." That is, the Convention creates obligations only for State Parties and "does

not by itself give rise to domestically enforceable federal law" absent "implementing legislation passed by Congress."

Congress gave the Convention domestic effect in 1998 when it passed the Chemical Weapons Convention Implementation Act. The Act closely tracks the text of the treaty: It forbids any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). It defines "chemical weapon" in relevant part as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." § 229F(1)(A). "Toxic chemical," in turn, is defined in general as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F(8)(A)…. A person who violates section 229 may be subject to severe punishment: imprisonment "for any term of years," or if a victim's death results, the death penalty or imprisonment "for life." § 229A(a).

[Carol Anne Bond learned that her close friend Myrlinda Haynes, was pregnant by Bond's husband. Bond, a microbiologist, sought revenge by spreading toxic chemicals she stole from her employer on Haynes car door, mailbox, and front door. While the chemicals are potentially lethal in large amounts, it was undisputed that Bond did not intend to kill Haynes. She instead hoped that Haynes would touch the chemicals and develop an uncomfortable rash. In fact, Haynes avoided contact with most of the chemicals, and sustained only a minor burn on her thumb which she treated by rinsing with water.

[Bond was arrested by federal authorities and charged with violating 18 U.S.C. § 229(a). Bond entered a conditional guilty plea, and was sentenced to six years in prison and a fine. She appealed the conviction, claiming that the statute was unconstitutional under the Tenth Amendment, that it exceeded Congress's treaty power, and that the terms of the statute did not apply to her conduct. After the lower court rejected her Tenth Amendment argument for lack of standing, the case went to the Supreme Court, which held that a criminal defendant had standing to make a federalism-based challenge to the criminal law under which she was charged. See Bond v. United States, 131 S. Ct. 2355 (2011) (Bond I, excerpted at p. 177 of this casebook.) On remand, the lower court considered and rejected her treaty power and statutory arguments and affirmed the conviction. The Supreme Court granted certiorari a second time to consider the treaty power question.]

The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce. In this case, however, the Court of Appeals held that the Government had explicitly disavowed that argument before the District Court. As a result, in this Court the parties have devoted significant effort to arguing whether section 229, as applied to Bond's offense, is a necessary and proper means of executing the National Government's power to make treaties. U.S. Const., Art. II, § 2, cl. 2. Bond argues that the lower court's reading of Missouri v. Holland would remove all limits on federal authority, so long as

the Federal Government ratifies a treaty first. She insists that to effectively afford the Government a police power whenever it implements a treaty would be contrary to the Framers' careful decision to divide power between the States and the National Government as a means of preserving liberty. To the extent that Holland authorizes such usurpation of traditional state authority, Bond says, it must be either limited or overruled.

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress's enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government's power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it is "a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." Bond argues that section 229 does not cover her conduct. So we consider that argument first.

Section 229 exists to implement the Convention, so we begin with that international agreement…. There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault.

Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that "[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention." …

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure….

Part of a fair reading of statutory text is recognizing that "Congress legislates against the backdrop" of certain unexpressed presumptions…. For example, we presume that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability. To take another example, we presume, absent a clear statement from Congress, that federal statutes do not apply outside the United States…. The notion that some things "go without saying" applies to legislation just as it does to everyday life.

Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution. It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, or preempt state law.

Closely related to these is the well-established principle that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law

overrides" the "usual constitutional balance of federal and state powers." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). [I]f the Federal Government would " 'radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit' " about it.

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. United States v. Morrison, 529 U.S. 598, 618 (2000). Thus, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." …

These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.

We do not find any such clear indication in section 229. "Chemical weapon" is the key term that defines the statute's reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a "chemical weapon." Saying that a person "used a chemical weapon" conveys a very different idea than saying the person "used a chemical in a way that caused some harm." The natural meaning of "chemical weapon" takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare….

The Government would have us brush aside the ordinary meaning and adopt a reading of section 229 that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room. Yet no one would ordinarily describe those substances as "chemical weapons." The Government responds that because Bond used "specialized, highly toxic" (though legal) chemicals, "this case presents no occasion to address whether Congress intended [section 229] to apply to common household substances." Brief for United States 13, n. 3. That the statute would apply so broadly, however, is the inescapable conclusion of the Government's position: Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of "chemical weapon" when doing so would transform a statute

passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish. That would not be a "realistic assessment[ ] of congressional intent."

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the States." Bond I, 131 S.Ct., at 2364. That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." Ibid.

…. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

In fact, with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes…. It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond….

If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE ALITO joins as to Part I, concurring in the judgment.

I. The Statutory Question

A. Unavoidable Meaning of the Text

The meaning of the Act is plain…. Applying [its] provisions to this case is hardly complicated. Bond possessed and used "chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm." Thus, she possessed "toxic chemicals." And, because they were not possessed or used only for a "purpose not prohibited," § 229F(1)(A), they were "chemical weapons." Ergo, Bond violated the Act. End of statutory analysis, I would have thought….

B. The Court's Interpretation

The Court's account of the clear-statement rule reads like a really good lawyer's brief for the wrong side, relying on cases that are so close to being on point that someone eager to reach the favored outcome might swallow them…. Though [in prior cases] the Court relied in part on a federalism-inspired interpretive presumption, it did so only after it had found, … applying traditional interpretive tools, that the text in question was ambiguous.

Had Congress "convey[ed] its purpose clearly" by enacting a clear and even sweeping statute, the [clear statement rule] would not have applied…. To say that the best reading of the text conformed to [federalism] principles is not to say that those principles can render clear text ambiguous.

The latter is what the Court says today. Inverting [our precedents], it starts with the federalism-related consequences of the statute's meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the "federal-state balance" of criminal jurisdiction, that effect causes the text, even if clear on its face, to be ambiguous. Just ponder what the Court says: "[The Act's] ambiguity derives from the improbably broad reach of the key statutory definition ... the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so...." Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences ... is ambiguous!

The same skillful use of oh-so-close-to-relevant cases characterizes the Court's pro forma attempt to find ambiguity in the text itself, specifically, in the term "[c]hemical weapon." The ordinary meaning of weapon, the Court says, is an instrument of combat, and "no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's door knob and mailbox as 'combat.' " Undoubtedly so, but undoubtedly beside the point, since the Act supplies its own definition of "chemical weapon," which unquestionably does bring Bond's action within the statutory prohibition. The Court retorts that "it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." So close to true! What is "not unusual" is using the ordinary meaning of the term being defined for the purpose of resolving an ambiguity in the definition. When, for example, "draft," a word of many meanings, is one of the words used in a definition of "breeze," we know it has nothing to do with military conscription or beer….

In this case, by contrast, the ordinary meaning of the term being defined is irrelevant, because the statute's own definition—however expansive—is utterly clear: any "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," § 229F(8)(A), unless the chemical is possessed or used for a "peaceful purpose," § 229F(1)(A), (7)(A). The statute parses itself. There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that "dissonance" between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition. No, the true rule is entirely clear: "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942 (2000) (emphasis added). Once again, contemplate the judge-empowering consequences of the new interpretive rule the Court today announces: When there is "dissonance" between the statutory definition and the ordinary meaning of the defined word, the latter may prevail.

But even text clear on its face, the Court suggests, must be read against the backdrop of established interpretive presumptions…. But there is nothing either (1) realistic or (2)

well known about the presumption the Court shoves down the throat of a resisting statute today. Who in the world would have thought that a definition is inoperative if it contradicts ordinary meaning? When this statute was enacted, there was not yet a "Bond presumption" to that effect—though presumably Congress will have to take account of the Bond presumption in the future, perhaps by adding at the end of all its definitions that depart from ordinary connotation "and we really mean it."

C. The Statute as Judicially Amended

I suspect the Act will not survive today's gruesome surgery. A criminal statute must clearly define the conduct it proscribes. If it does not " 'give a person of ordinary intelligence fair notice' " of its scope, it denies due process.

The new § 229(a)(1) fails that test. Henceforward, a person "shall be fined ..., imprisoned for any term of years, or both," § 229A(a)(1)—or, if he kills someone, "shall be punished by death or imprisoned for life," § 229A(a)(2)—whenever he "develop[s], produce[s], otherwise acquire[s], transfer [s] directly or indirectly, receive[s], stockpile[s], retain[s], own [s], possess[es], or use[s], or threaten[s] to use," § 229(a)(1), any chemical "of the sort that an ordinary person would associate with instruments of chemical warfare." Whether that test is satisfied, the Court unhelpfully (and also illogically) explains, depends not only on the "particular chemicals that the defendant used" but also on "the circumstances in which she used them." The "detergent under the kitchen sink" and "the stain remover in the laundry room" are apparently out—but what if they are deployed to poison a neighborhood water fountain? Poisoning a goldfish tank is also apparently out, but what if the fish belongs to a Congressman or Governor and the act is meant as a menacing message, a small-time equivalent of leaving a severed horse head in the bed? … What, one wonders, makes something a "chemical weapon" when it is merely "stockpile[d]" or "possess[ed]?" To these questions and countless others, one guess is as bad as another.

No one should have to ponder the totality of the circumstances in order to determine whether his conduct is a felony. Yet that is what the Court will now require of all future handlers of harmful toxins—that is to say, all of us. Thanks to the Court's revisions, the Act, which before was merely broad, is now broad and unintelligible. "[N]o standard of conduct is specified at all." Coates v. Cincinnati, 402 U.S. 611 (1971). Before long, I suspect, courts will be required to say so.

II. The Constitutional Question

Since the Act is clear, the real question this case presents is whether the Act is constitutional as applied to petitioner. An unreasoned and citation-less sentence from our opinion in Missouri v. Holland, 252 U.S. 416 (1920), purported to furnish the answer: "If the treaty is valid"—and no one argues that the Convention is not—"there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Id., at 432. Petitioner and her amici press us to consider whether there is anything to this ipse dixit. The Constitution's text and structure show that there is not.

A. Text

Under Article I, § 8, cl. 18, Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." One such "other Powe[r]" appears in Article II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Read together, the two Clauses empower Congress to pass laws "necessary and proper for carrying into Execution ... [the] Power ... to make Treaties."

It is obvious what the Clauses, read together, do not say. They do not authorize Congress to enact laws for carrying into execution "Treaties," even treaties that do not execute themselves, such as the Chemical Weapons Convention.

> **FN 6.** Non-self-executing treaties are treaties whose commitments do not "automatically have effect as domestic law," and "can only be enforced pursuant to legislation to carry them into effect."

Surely it makes sense, the Government contends, that Congress would have the power to carry out the obligations to which the President and the Senate have committed the Nation. The power to "carry into Execution" the "Power ... to make Treaties," it insists, has to mean the power to execute the treaties themselves.

That argument, which makes no pretense of resting on text, unsurprisingly misconstrues it. Start with the phrase "to make Treaties." A treaty is a contract with a foreign nation made, the Constitution states, by the President with the concurrence of "two thirds of the Senators present." That is true of self-executing and non-self-executing treaties alike; the Constitution does not distinguish between the two. So, because the President and the Senate can enter into a non-self-executing compact with a foreign nation but can never by themselves (without the House) give that compact domestic effect through legislation, the power of the President and the Senate "to make" a Treaty cannot possibly mean to "enter into a compact with a foreign nation and then give that compact domestic legal effect." We have said in another context that a right "to make contracts" (a treaty, of course, is a contract) does not "extend ... to conduct ... after the contract relation has been established.... Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations." Upon the President's agreement and the Senate's ratification, a treaty—no matter what kind—has been made and is not susceptible of any more making.

How might Congress have helped "carr[y]" the power to make the treaty—here, the Chemical Weapons Convention—"into Execution"? In any number of ways. It could have appropriated money for hiring treaty negotiators, empowered the Department of State to appoint those negotiators, formed a commission to study the benefits and risks of entering into the agreement, or paid for a bevy of spies to monitor the treaty-related deliberations of other potential signatories….

But a power to help the President make treaties is not a power to implement treaties already made. See generally Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev.

1867 (2005). Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.

B. Structure

"[T]he Constitutio[n] confer[s] upon Congress ... not all governmental powers, but only discrete, enumerated ones." Printz v. United States, 521 U.S. 898, 919 (1997). And, of course, "enumeration presupposes something not enumerated." Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824).

But in Holland, the proponents of unlimited congressional power found a loophole: "By negotiating a treaty and obtaining the requisite consent of the Senate, the President ... may endow Congress with a source of legislative authority independent of the powers enumerated in Article I." L. Tribe, American Constitutional Law § 4–4, pp. 645–646 (3d ed. 2000). Though Holland's change to the Constitution's text appears minor (the power to carry into execution the power to make treaties becomes the power to carry into execution treaties), the change to its structure is seismic.

To see why vast expansion of congressional power is not just a remote possibility, consider two features of the modern practice of treaty making. In our Nation's early history, and extending through the time when Holland was written, treaties were typically bilateral, and addressed only a small range of topics relating to the obligations of each state to the other, and to citizens of the other—military neutrality, for example, or military alliance, or guarantee of most-favored-nation trade treatment. But beginning in the last half of the last century, many treaties were "detailed multilateral instruments negotiated and drafted at international conferences," and they sought to regulate states' treatment of their own citizens, or even "the activities of individuals and private entities," "[O]ften vague and open-ended," such treaties "touch on almost every aspect of domestic civil, political, and cultural life."

Consider also that, at least according to some scholars, the Treaty Clause comes with no implied subject-matter limitations….

If that is true, then the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched. It could begin, as some scholars have suggested, with abrogation of this Court's constitutional rulings. For example, the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress's enumerated powers, United States v. Lopez, 514 U.S. 549, 551 (1995), could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools. Similarly, Congress could reenact the invalidated part of the Violence Against Women Act of 1994 that provided a civil remedy for victims of gender-motivated violence, just so long as there were a treaty on point—and some authors think there already is, see MacKinnon, The Supreme Court, 1999 Term, Comment, 114 Harv. L. Rev. 135, 167 (2000).

But reversing some of this Court's decisions is the least of the problem. Imagine the United States' entry into an Antipolygamy Convention, which called for—and Congress

enacted—legislation providing that, when a spouse of a man with more than one wife dies intestate, the surviving husband may inherit no part of the estate. Constitutional? The Federalist answers with a rhetorical question: "Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that ... it had exceeded its jurisdiction and infringed upon that of the State?" The Federalist No. 33, at 206 (A. Hamilton). Yet given the Antipolygamy Convention, Holland would uphold it. Or imagine that, to execute a treaty, Congress enacted a statute prohibiting state inheritance taxes on real property. Constitutional? Of course not. Again, The Federalist: "Suppose ... [Congress] should undertake to abrogate a land tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its constitution plainly supposes to exist in the State governments?" No. 33, at 206. Holland would uphold it. As these examples show, Holland places Congress only one treaty away from acquiring a general police power.

The Necessary and Proper Clause cannot bear such weight. As Chief Justice Marshall said regarding it, no "great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them." McCulloch v. Maryland, 4 Wheat. 316, 411 (1819). No law that flattens the principle of state sovereignty, whether or not "necessary," can be said to be "proper." As an old, well-known treatise put it, "it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution." 1 W. Willoughby, The Constitutional Law of the United States § 216, p. 504 (1910).

We would not give the Government's support of the Holland principle the time of day were we confronted with "treaty-implementing" legislation that abrogated the freedom of speech or some other constitutionally protected individual right. We proved just that in Reid v. Covert, 354 U.S. 1 (1957), which held that commitments made in treaties with Great Britain and Japan would not permit civilian wives of American servicemen stationed in those countries to be tried for murder by court-martial. The plurality opinion said that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

The Government raises a functionalist objection: If the Constitution does not limit a self-executing treaty to the subject matter delineated in Article I, § 8, then it makes no sense to impose that limitation upon a statute implementing a non-self-executing treaty. See Tr. of Oral Arg. 32–33. The premise of the objection (that the power to make self-executing treaties is limitless) is, to say the least, arguable. But even if it is correct, refusing to extend that proposition to non-self-executing treaties makes a great deal of sense. Suppose, for example, that the self-aggrandizing Federal Government wishes to take over the law of intestacy. If the President and the Senate find in some foreign state a ready accomplice, they have two options. First, they can enter into a treaty with "stipulations" specific enough that they "require no legislation to make them operative," Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888), which would mean in this example something like a comprehensive probate code. But for that to succeed, the President and a supermajority of the Senate would need to reach agreement

on all the details—which, when once embodied in the treaty, could not be altered or superseded by ordinary legislation. The second option—far the better one—is for Congress to gain lasting and flexible control over the law of intestacy by means of a non-self-executing treaty. "[Implementing] legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." Ibid. And to make such a treaty, the President and Senate would need to agree only that they desire power over the law of intestacy….

We have here a supposedly "narrow" opinion which, in order to be "narrow," sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come. The immediate product of these interpretive novelties is a statute that should be the envy of every lawmaker bent on trapping the unwary with vague and uncertain criminal prohibitions. All this to leave in place an ill-considered ipse dixit that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I, II, and III, concurring in the judgment.

By its clear terms, the statute at issue in this case regulates local criminal conduct that is subject to the powers reserved to the States. That aggrandizement of federal power cannot be justified as a "necessary and proper" means of implementing a treaty addressing similar subject matter.

I write separately to suggest that the Treaty Power is itself a limited federal power…. [T]o interpret the Treaty Power as extending to every conceivable domestic subject matter—even matters without any nexus to foreign relations—would destroy the basic constitutional distinction between domestic and foreign powers. It would also lodge in the Federal Government the potential for "a police power over all aspects of American life." Lopez, supra, at 584 (THOMAS, J., concurring)….

I doubt the Treaty Power creates such a gaping loophole in our constitutional structure. Although the parties have not challenged the constitutionality of the particular treaty at issue here, in an appropriate case I believe the Court should address the scope of the Treaty Power as it was originally understood….

The Treaty Power was not drafted on a blank slate. To the contrary, centuries of experience—reflected in treatises, dictionaries, and actual practice—shaped the contours of that power.

Early treatises discussed a wide variety of treaties that nevertheless shared a common thread: All of them governed genuinely international matters such as war, peace, and trade between nations…. Founding-era dictionaries reflect a similar understanding…. Debates preceding the ratification of the proposed Constitution confirm the limited scope of the powers possessed by the Federal Government generally; the Treaty Power was no

exception. The Framers understood that most regulatory matters were to be left to the States….

The original understanding that the Treaty Power was limited to international intercourse has been well represented in this Court's precedents…. Nothing in our cases, on the other hand, suggests that the Treaty Power conceals a police power over domestic affairs.

Whatever its other defects, Missouri v. Holland, 252 U.S. 416 (1920), is consistent with that view. There, the Court …. observed that the treaty at issue addressed migratory birds that were "only transitorily within the State and ha [d] no permanent habitat therein." As such, the birds were naturally a matter of international intercourse because they were creatures in international transit….

Only in the latter part of the past century have treaties challenged that prevailing conception by addressing "matters that in the past countries would have addressed wholly domestically" and "purport[ing] to regulate the relationship between nations and their own citizens."[1] But even the Solicitor General in this case would not go that far; he acknowledges that "there may well be a line to be drawn" regarding "whether the subject matter of [a] treaty is a proper subject for a treaty." Tr. of Oral Arg. 43:10–15.

In an appropriate case, I would draw a line that respects the original understanding of the Treaty Power. I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases. But this Court has long recognized that the Treaty Power is limited, and hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power….

JUSTICE ALITO, concurring in the judgment.

…. The treaty pursuant to which § 229 was enacted, the Chemical Weapons Convention, is not self-executing, and thus the Convention itself does not have domestic effect without congressional action. The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution. The Government has presented no such justification for this statute.

For these reasons, I would reverse petitioner's conviction on constitutional grounds.

[1] Justice Thomas's opinion gives no examples in support of this assertion. We have only omitted a law review citation from the original. – Eds.

Review Questions and Explanations: *Bond v. United States (Bond II)*

1. Consider the practical consequences of the majority and separate opinions. The majority construes the statute to exclude a "purely local" criminal assault. The separate opinions argue that the treaty power combined with the necessary and proper clause cannot be construed to give Congress powers to enact domestic laws that it could not enact under its enumerated powers (including the necessary and proper clause). Do Scalia or Thomas say that Congress lacks the power to criminalize possession or use of chemical weapons? If they do not say this, then how would federal regulation of chemical weapons differ under the Scalia-Thomas view from what emerged from the majority view?

2. The majority adopts what is sometimes referred to as a "saving construction" of the chemical weapons statute: interpreting the statute to save it from acknowledged or potential unconstitutionality. In doing so, it employs two related, but different interpretive principles. (1) Under the "doctrine of constitutional avoidance," the Court will sometimes interpret a statute in a manner that avoids the need to decide the statute's constitutionality. (2) The federalism "clear statement rule" creates a presumption in favor of construing a statute in a manner that does not extend federal power into an area of "traditional" state concern or control unless the statute clearly intends to do so. The two principles overlap, but differ: the clear statement rule can be applied whether or not Congress has a clear legislative power over the matter. The Court has not always been consistent in employing these rules.

In this case, the majority and Justice Scalia differ over whether the interpretive rules have been properly triggered. Scalia is typically a stickler for refraining from using these rules where the statutory intent is unambiguous, and here he argues that the statute was unambiguous, though overly broad. The majority suggests that a statute whose language extends well beyond what was probably intended is ambiguous and thus subject to interpretive rules. Whom do you agree with, and why?

3. Scalia argues that the statute was clear before the majority's narrowing interpretation, and is now so vague as to fail the test of due process—a reasonable person will not know what conduct is prohibited. Was a reasonable person better able to know what conduct the statute prohibited prior to the Bond decision?

4. The three concurring justices argue that the majority expands the power of judges at the expense of Congress by expanding the grounds for employing the two above interpretive rules. But all three would have held the statute unconstitutional. Is that less expansive of judicial power at the expense of Congress than what the majority did?

5. Justice Scalia argues that the necessary and proper clause authorizes congress only to take legislative steps to make a treaty but not enforce it. The argument—heavily influenced by the law review article he cites—has a certain textual and formalistic appeal. But the argument raises difficulties and unanswered questions:

a) If the power to make treaties is merely, as Scalia asserts, a power to enter international "contracts" without conferring any power over subject matter, then what is the substantive reach of the treaty power? Is it limited to the enumerated powers of Congress? Scalia does not answer this question. Alito and Thomas imply that there

is a substantive power to conduct foreign affairs extending beyond Article I, section 8, and numerous Supreme Court precedents support such a view. (See, e.g., Chapter 3, section D of the casebook.)

But if there is such a substantive power, why doesn't the necessary and proper clause extend to it? The clause authorizes Congress to enact laws "necessary and proper for carrying into execution the [Article I, section 8] powers, *and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof*." By its plain terms, the necessary and proper clause encompasses powers of other branches of government and other parts of the Constitution outside Article, section 8. So if there is some unspecified "foreign affairs power," the necessary and proper clause extends to it.

b) Wouldn't the power to make treaties be severely hampered if Congress could not act to execute the United States' treaty obligations? Putting this another way, how reasonable is it to suppose that the framers created a treaty power with for Congress to take steps necessary and proper to execute the United States' obligations under the treaty? Congress has to appropriate money and raise military forces to meet a military treaty obligation. It was generally assumed on all hands, for example, that President Roosevelt's Lend Lease agreement to supply Britain and the USSR in World War II required an act of Congress to authorize and implement it.

c) Even assuming that Congress derives all of its treaty-implementation powers only from expressly enumerated powers in the Constitution, it is noteworthy that none of the concurring justices undertake a necessary and proper clause analysis – i.e., they never analyze whether regulating certain intrastate conduct is necessary and proper to the United States' acknowledged power to enter into an international chemical weapons ban treaty. They simply assert that it is not. But compare the bald assertion here to Scalia's concurring opinion in *Gonzales v. Raich* (see Chapter 1, section C.4 of the casebook), in which he asserts that a federal ban on simple intrastate possession of marijuana is necessary and proper to regulating the nationwide illegal drug market.

d) It is true that the government argued that the Treaty Power was the sole basis for the law, but the Court was not bound by that position. Had the Court actually reached the constitutional question, it would have been able to, and arguably obliged to, consider other powers of Congress, such as the commerce clause. How might you redraft the law to make it constitutional under the commerce clause?

6. Alito says that the "heart" of the chemical weapons ban is a constitutional exercise of the treaty power, which is only exceeded by "criminalizing conduct *of the sort at issue in this case*" (emphasis added). This sounds as if Alito were treating Bond's claim as an "as applied" challenge. Had the Court gone that route, how if at all would the end result have differed from what the majority actually did?

D. Foreign Affairs

For inclusion at p. 434, after Dames & Moore *case note.*

Guided Reading Questions: *Zivotofsky v. Kerry*

1. What are the questions presented for review in this case?

2. What are the modes of constitutional analysis and argument the Court uses in this case? Which mode or modes are the most persuasive? Are any of them dispositive? Note that both the majority and the dissents go at the question in more or less the same way.

3. What is the precise holding? In reading the opinions, try to pin down what they mean by "recognition."

4. The majority and dissent both discuss the language from Curtiss-Wright that addresses executive power over foreign affairs in far-reaching terms. How many justices agree with the most expansive reading of that language?

Zivotofsky v. Kerry
135 S. Ct. 2076 (2015)

Majority: ***Kennedy***, Ginsburg, Breyer, Sotomayor, and Kagan

Concurrence: *Breyer* (omitted)

Partial concurrence, partial dissent: *Thomas*

Dissents: ***Roberts (CJ), Scalia,*** Alito

JUSTICE KENNEDY delivered the opinion of the Court.

> [The parents of a boy born in Jerusalem in 2002 to U.S. citizen parents sued the State Department to require it to issue him a passport identifying his birthplace as "Jerusalem, Israel." Pursuant to longstanding presidential policy, the passport listed Zivotofsky's birthplace "Jerusalem." Since the Truman Administration formally recognized Israel as a sovereign nation in 1948, the international status of Jerusalem has remained a contested issue, and no U.S. president has officially acknowledged any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." Because the United States does not recognize any country as having sovereignty over Jerusalem, the State

> Departent policy requires employees to record the place of birth for citizens born there as "Jerusalem." The State Department implements this policy in its Foreign Affairs Manual (FAM), which provides that U.S. passports record the place of birth as the country having "present sovereignty over the actual area of birth." A citizen who objects to the country listed as sovereign by the State Department, may list the city or town of birth rather than the country, but does not allow citizens to list a sovereign that conflicts with Executive Branch policy. However, the Foreign Relations Authorization Act, Fiscal Year 2003, sought to override the State Department policy by providing that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1350, § 214(d).]

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition….

I

….When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." The President concluded, "U.S. policy regarding Jerusalem has not changed."

Some parties were not reassured by the President's statement. A cable from the United States Consulate in Jerusalem noted that the Palestine Liberation Organization Executive Committee, Fatah Central Committee, and the Palestinian Authority Cabinet had all issued statements claiming that the Act "undermines the role of the U.S. as a sponsor of the peace process." In the Gaza Strip and elsewhere residents marched in protest.

In response the Secretary of State advised diplomats to express their understanding of "Jerusalem's importance to both sides and to many others around the world." He noted his belief that America's "policy towards Jerusalem" had not changed.

[Zivotofsky filed suit, claiming that § 214(d) required the State Department to list Israel as his country of birth. The government argued on the merits that § 214(d) was unconstitutional. The District Court initially dismissed Zivotofsky's his case, reasoning that it presented a nonjusticiable political question and that Zivotofsky lacked standing. The D.C. Circuit reversed on the standing issue, but affirmed on the political question issue. The Supreme Court vacated and remanded the case in 2012, holding that the constitutionality of § 214(d) did not require judicial resolution of the political question of whether Jerusalem is part of Israel, and was therefore justiciable. Zivotofsky v. Clinton, 132 S.Ct., at 1427. On remand the Court of Appeals held the statute unconstitutional, and the Supreme Court again granted certiorari.]

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–638 (1952) (concurring opinion)….

In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." In so doing the Secretary acknowledges the President's power is "at its lowest ebb." Youngstown, 343 U.S., at 637. Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone.

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

A

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." Restatement (Third) of Foreign Relations Law of the United States § 203, Comment a, p. 84 (1986). It may also involve the determination of a state's territorial bounds. Recognition is often effected by an express "written or oral declaration." 1 J. Moore, Digest of International Law § 27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. Ibid.; I. Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, and may benefit from sovereign immunity when they are sued. The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. Recognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus "useful, even necessary," to the existence of a state.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations § 78, p. 461 (1758) (J. Chitty ed. 1853). It is a

logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, Pacificus No. 1, in The Letters of Pacificus and Helvidius 5, 13–14 (1845) (reprint 1976). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause "includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." See id., at 12; see also 3 J. Story, Commentaries on the Constitution of the United States § 1560, p. 416 (1833) ("If the executive receives an ambassador, or other minister, as the representative of a new nation ... it is an acknowledgment of the sovereign authority de facto of such new nation, or party"). As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, § 2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls." Ibid.

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador. The President has the sole power to negotiate treaties, see United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here. Art. II, § 1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not.

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

Recognition is a topic on which the Nation must "speak ... with one voice." Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000). That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers….

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. § 8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown, 343 U.S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

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

must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, or between the courts and the political branches—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive….

Banco Nacional de Cuba contains [the strongest] statements regarding the President's authority over recognition. There, the status of Cuba's Government and its acts as a sovereign were at issue. As the Court explained, "Political recognition is exclusively a function of the Executive." 376 U.S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the "act of state" doctrine. As [our] cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers."… [T]he Secretary quotes United States v. Curtiss–Wright Export Corp., which described the President as "the sole organ of the federal government in the field of international relations." This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The Curtiss–Wright case does not extend so far as the Secretary suggests. In Curtiss–Wright, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. The Court held that the delegation was constitutional, reasoning that Congress may grant the President

substantial authority and discretion in the field of foreign affairs. Id., at 315–329, 57 S.Ct. 216. Describing why such broad delegation may be appropriate, the opinion stated:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

This description of the President's exclusive power was not necessary to the holding of Curtiss–Wright—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, Curtiss–Wright did not hold that the President is free from Congress' lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition….

C

…. In separation-of-powers cases this Court has often "put significant weight upon historical practice." NLRB v. Noel Canning, 134 S.Ct. 2550, 2559 (2014). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone…. [E]ven a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress. As Judge Tatel noted in this case, however, "the most striking thing" about the history of recognition "is what is absent from it: a situation like this one," where Congress has enacted a statute contrary to

the President's formal and considered statement concerning recognition. [the Court proceeded to discuss incidents from the administrations of presidents Washington, Monroe, Jackson, Lincoln, McKinley and Carter, with a short summary of the 80 years in between the latter two.]

…. For the most part, Congress has respected the Executive's policies and positions as to formal recognition. At times, Congress itself has defended the President's constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President's power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking "with one voice." The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

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

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination….

As Justice Jackson wrote in Youngstown, when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." 343 U.S., at 637–638 (concurring opinion). Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

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

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional…. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do….

In holding § 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is affirmed.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly. Second, it vests the residual foreign affairs powers of the Federal Government—i.e., those not specifically enumerated in the Constitution—in the President by way of Article II's Vesting Clause.

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, ignores that constitutional allocation of power insofar as it directs the President, contrary to his wishes, to list "Israel" as the place of birth of Jerusalem-born citizens on their passports. The President has long regulated passports under his residual foreign affairs power, and this portion of § 214(d) does not fall within any of Congress' enumerated powers.

By contrast, § 214(d) poses no such problem insofar as it regulates consular reports of birth abroad. Unlike passports, these reports were developed to effectuate the naturalization laws, and they continue to serve the role of identifying persons who need not be naturalized to obtain U.S. citizenship. The regulation of these reports does not fall within the President's foreign affairs powers, but within Congress' enumerated powers under the Naturalization and Necessary and Proper Clauses.

Rather than adhere to the Constitution's division of powers, the Court relies on a distortion of the President's recognition power to hold both of these parts of § 214(d) unconstitutional. Because I cannot join this faulty analysis, I concur only in the portion of the Court's judgment holding § 214(d) unconstitutional as applied to passports. I respectfully dissent from the remainder of the Court's judgment….

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–638 (1952) (Jackson, J., concurring).

…. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to "take Care that the Laws be

faithfully executed." Art. II, § 3. 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." Youngstown, 343 U.S., at 637–638 (Jackson, J., concurring).

Assertions of exclusive and preclusive power leave the Executive "in the least favorable of possible constitutional postures," and such claims have been "scrutinized with caution" throughout this Court's history.

…. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, § 3. But that provision, framed as an obligation rather than an authorization, appears alongside the duties imposed on the President by Article II, Section 3, not the powers granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assurance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961)….

The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are shared with Congress, so they hardly support an inference that the recognition power is exclusive.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared….As for history, the majority admits that it too points in both directions….

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition. The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that "identification"—not recognition—"is the principal reason that U.S. passports require 'place of birth.' " Congress has not disputed the Executive's assurances that § 214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that § 214(d) does "not itself constitute a formal act of recognition." Ante, at 2095. Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving § 214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." But as just noted, neither Congress nor the Executive Branch regards § 214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a perceived contradiction based on a mistaken understanding of the effect of § 214(d), insisting that some "observers interpreted § 214 as altering United States policy regarding Jerusalem." To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto.

Moreover, expanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress's wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President's recognition decision. And yet each of them would undoubtedly be constitutional. So too would statements by nonlegislative actors that might be seen to contradict the President's recognition positions, such as the declaration in a political party platform that "Jerusalem is and will remain the capital of Israel." Landler, Pushed by Obama, Democrats Alter Platform Over Jerusalem, N.Y. Times, Sept. 6, 2012, p. A14.

Ultimately, the only power that could support the President's position is the one the majority purports to reject: the "exclusive authority to conduct diplomatic relations." The Government offers a single citation for this allegedly exclusive power: United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 319–320 (1936). But as the majority rightly acknowledges, Curtiss–Wright did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation.

The expansive language in Curtiss–Wright casting the President as the "sole organ" of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power.

Just a few Terms ago, this Court rejected the President's argument that a broad foreign relations power allowed him to override a state court decision that contradicted U.S. international law obligations. Medellín, 552 U.S., at 523–532, 128 S.Ct. 1346. If the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which—unlike the States—has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the

Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs. I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting.

…. The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on. 2 M. Whiteman, Digest of International Law § 1 (1963) (hereinafter Whiteman). President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel's (or any other state's) sovereign territory.

The Court holds that the Constitution makes the President alone responsible for recognition and that § 214(d) invades this exclusive power. I agree that the Constitution empowers the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive…. To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. 48 Stat. 456. In the course of doing so, Congress directed the President to "recognize the independence of the Philippine Islands as a separate and self-governing nation" and to "acknowledge the authority and control over the same of the government instituted by the people thereof." § 10, id., at 463. Constitutional? And if Congress may control recognition when exercising its power "to dispose of ... the Territory or other Property belonging to the United States," Art. IV, § 3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because § 214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. "Its legal effect is to create an estoppel. By granting recognition, [states] debar themselves from challenging in future whatever they have previously acknowledged." 1 G. Schwarzenberger, International Law 127 (3d ed. 1957). In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman § 3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador.

To know all this is to realize at once that § 214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli

sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required all passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) requests "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer's country of birth in his passport, Dept. of State, 7 Foreign Affairs Manual (FAM) § 1300, App. D, § 1330(a) (2014), the State Department will, if the bearer protests, specify the city of birth instead—so that an Irish nationalist may have his birthplace recorded as "Belfast" rather than "United Kingdom," id., § 1380(a). And although normal protocol requires specifying the country with present sovereignty over the bearer's place of birth, id., § 1330(b), a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as "Palestine," id., § 1360(g). Section 214(d) requires the State Department to make a further accommodation….

[Section] 214(d) likewise calls for nothing beyond a "geographic description"; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress's control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to "record the place of birth as Israel" "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport." And the law bears the caption, "Record of Place of Birth as Israel for Passport Purposes." Finding recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program.

III

…. Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to "regulate Commerce with foreign Nations," § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to "regulate the Value ... of foreign Coin," § 8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers. These are not airy hypotheticals. A trade statute from 1800, for example, provided that "the whole of the island of

Hispaniola"—whose status was then in controversy—"shall for purposes of [the] act be considered as a dependency of the French Republic." § 7, 2 Stat. 10. In 1938, Congress allowed admission of the Vatican City's public records in federal courts, decades before the United States extended formal recognition. ch. 682, 52 Stat. 1163; Whiteman § 68. The Taiwan Relations Act of 1979 grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state. 22 U.S.C. § 3303(b)(7). Section 214(d) continues in the same tradition.

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory "are legitimate in the eyes of the United States," ante, at 2086. Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides. To take just one example, in 1991, Congress responded to Iraq's invasion of Kuwait by enacting a resolution authorizing use of military force. 105 Stat. 3. No doubt the resolution reflected Congress's views about the legitimacy of Iraq's territorial claim. The preamble referred to Iraq's "illegal occupation" and stated that "the international community has demanded ... that Kuwait's independence and legitimate government be restored." Ibid. These statements are far more categorical than the caption "United States Policy with Respect to Jerusalem as the Capital of Israel." Does it follow that the authorization of the use of military force invaded the President's exclusive powers? Or that it would have done so had the President recognized Iraqi sovereignty over Kuwait?

History does not even support an exclusive Presidential power to make what the Court calls "formal statements" about "the legitimacy of a state or government and its territorial bounds." For a long time, the Houses of Congress have made formal statements announcing their own positions on these issues, again without provoking constitutional objections….

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else § 214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel's sovereignty over Jerusalem.

IV

The Court does not try to argue that § 214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face.

The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the "formal recognition determination," the President holds an ancillary exclusive power "to control ... formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds." Ante, at 2096. It follows, the Court explains, that Congress may not "requir[e] the President to contradict an earlier recognition

determination in an official document issued by the Executive Branch." Ibid. So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense….

V

Justice THOMAS's concurrence deems § 214(d) constitutional to the extent it regulates birth reports, but unconstitutional to the extent it regulates passports…. The concurrence's stingy interpretation of the enumerated powers forgets that the Constitution does not "partake of the prolixity of a legal code," that "only its great outlines [are] marked, its important objects designated, and the minor ingredients which compose those objects [left to] be deduced from the nature of the objects themselves." McCulloch, 4 Wheat., at 407. It forgets, in other words, "that it is a constitution we are expounding." Ibid.

…. It turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around. Congress may make laws necessary and proper for carrying into execution the President's powers, Art. I, § 8, cl. 18, but the President must "take Care" that Congress's legislation "be faithfully executed," Art. II, § 3. And Acts of Congress made in pursuance of the Constitution are the "supreme Law of the Land"; acts of the President (apart from treaties) are not. Art. VI, cl. 2. That is why Chief Justice Marshall was right to think that a law prohibiting the seizure of foreign ships trumped a military order requiring it. Little v. Barreme, 2 Cranch 170, 178–179, 2 L.Ed. 243 (1804). It is why Justice Jackson was right to think that a President who "takes measures incompatible with the expressed or implied will of Congress" may "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (concurring opinion) (emphasis added). And it is why Justice THOMAS is wrong to think that even if § 214(d) operates in a field of shared authority the President might still prevail.

* * *

International disputes about statehood and territory are neither rare nor obscure. Leading foreign debates during the 19th century concerned how the United States should respond to revolutions in Latin America, Texas, Mexico, Hawaii, Cuba. During the 20th century, attitudes toward Communist governments in Russia and China became conspicuous subjects of agitation. Disagreements about Taiwan, Kashmir, and Crimea remain prominent today. A President empowered to decide all questions relating to these matters, immune from laws embodying congressional disagreement with his position, would have uncontrolled mastery of a vast share of the Nation's foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about any subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies. Under the Constitution they approved, Congress may

require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem. I dissent.

Review Questions and Explanations: *Zivotofsky*

1. The majority reaches a question of first impression when it decides that the power of "recognition" of foreign governments is exclusively given to the President. Do you agree with the majority's resolution of the question?

2. The dissenters argue that it was not necessary to resolve the question of whether the President had an exclusive recognition power, but then, they would have upheld § 214. Would it have been possible to decide the case the way majority did, but on a narrower ground? In other words, could the Court have upheld the State Department's passport policy without holding that the president has an exclusive recognition power?

3. Do the majority and dissent use the concept of a "recognition power" in the same way?

4. The dissenters imply that the majority's holding represents a significant of blow to separation of powers in the field of foreign affairs. Does it? If one views "recognition" as an expansive power, then the exclusivity ruling could in theory have far-reaching implications over foreign affairs. How likely is it that *Zivotofsky* will be relied on to strike down some of the laws in which Congress has impliedly recognized foreign governments, as noted in the Roberts and Scalia opinions? How might *Zivotofsky* be distinguished?

H. Appointment and Removal of Executive Officers

* * *

3. Synthesis: Appointment and Removal Powers

[For inclusion following *Morrison v. Olson*, p. 486.]

Guided Reading Questions: *NLRB v. Noel Canning*

1. Be sure you understand both why the majority and Scalia opinions concur in the result, and how they differ.

2. Both the majority and dissent engage in lengthy historical analysis of recess appointments. Why do they do this? How do they differ about the significance of the history?

3. By holding the recess appointments invalid, the Court's decision meant that dozens of rulings by the National Labor Relations Board going back to 2009 would be invalidated. How if at all did these stakes weigh in the decision? Should they have been given more weight?

4. Try to discern the stakes for a presidential administration in pursuing its policies during a time of congressional gridlock. What does the majority say about gridlock? Under the concurrence's view, when could the President make recess appointments? Under the majority's view, could Congress schedule pro forma sessions throughout each legislative session to restrict recess appointments to only those windows the concurring justices would permit?

5. The majority says "We fail to see how excising the Recess Appointments Clause preserves freedom." The concurring justices imply that a restrictive reading of the recess appointments clause will preserve freedom. What are the two sides getting at?

National Labor Relations Board v. Noel Canning

572 U.S. __, 134 S. Ct. 2550 (2014)

Majority: ***Breyer***, Kennedy, Ginsburg, Sotomayor, Kagan

Concurrence in the judgment: ***Scalia***, Roberts (CJ), Thomas, Alito

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." U.S. Const., 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. S. J., 112th Cong., 1st Sess., 923 (2011)

(hereinafter 2011 S. J.). In calculating the length of a recess are we to ignore the pro forma sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these pro forma sessions.

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

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi–Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to execute the agreement and to make employees whole for any losses.

The Pepsi–Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act…. The three members in question were Sharon Block, Richard Griffin, and Terence Flynn. In 2011 the President had nominated each of them to the Board. As of January 2012, Flynn's nomination had been pending in the Senate awaiting confirmation for approximately a year. The nominations of each of the other two had been pending for a few weeks. On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

[The Court of Appeals set aside the order on the ground that the appointments were invalid. It held that the Clause's words "the recess of the Senate" do not include recesses that occur within a formal session of Congress, i.e., intra-session recesses; and that the phrase "vacancies that may happen during the recess" applies only to vacancies that come into existence during a recess.]

…. We recognize that the President has nominated others to fill the positions once occupied by Members Block, Griffin, and Flynn, and that the Senate has confirmed these successors. But, as the parties recognize, the fact that the Board now unquestionably has a quorum does not moot the controversy about the validity of the previously entered Board order. And there are pending before us petitions from decisions in other cases involving challenges to the appointment of Board Member Craig Becker. The President appointed Member Becker during an intra-session recess that was not punctuated by pro forma sessions, and the vacancy Becker filled had come into existence prior to the recess. Thus, we believe it is important to answer all three questions that this case presents.

II

[T]he 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 …. 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."

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). Alexander Hamilton wrote that the Constitution vests the power of nomination in the President alone because "one man of discernment is better fitted to analise and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment." The Federalist No. 76, p. 510 (J. Cooke ed. 1961). 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." Id., at 513. 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 authorise the President singly to make temporary appointments. Id., No. 67, at 455.

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, see Art. I, § 4, cl. 2; Amdt. 20, § 2 (requiring the Senate to "assemble" only "once in every year"); 3 J. Story, Commentaries on the Constitution of the United States § 1551, p. 410 (1833) (it would be "burthensome to the senate, and expensive to the public" to require the Senate to be "perpetually in session"). 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. Long ago Chief Justice Marshall wrote that

> a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." McCulloch v. Maryland, 4 Wheat. 316, 401 (1819).

And we later confirmed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" regulating the relationship between Congress and the President. The Pocket Veto Case, 279 U.S. 655, 689 (1929).

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, Clinton v. City of New York, 524 U.S. 417, 449–450 (1998) (KENNEDY, J., concurring), 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, 1 Cranch 137, 177 (1803). But it is equally true that the longstanding "practice of the government," McCulloch, supra, at 401, can inform our determination of "what the law is." …

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." Art. II, § 2, cl. 3 (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." Congressional Research Service, H. Hogue, Recess Appointments: Frequently Asked Questions 2 (2013). The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will "adjourn sine die," i.e., without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

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

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

We recognize that the word "the" in "the recess" might suggest that the phrase refers to the single break separating formal sessions of Congress….

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)…. 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. President Franklin Roosevelt, for example, commissioned Dwight Eisenhower as a permanent Major General during an intra-session recess; President Truman made Dean Acheson Under Secretary of State; and President George H.W. Bush reappointed Alan Greenspan as Chairman of the Federal Reserve Board….

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….

[R]estricting 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….

[S]ome 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." Art. II, § 2, cl. 3. 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. That process may take several months. 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. An appointment should last until the Senate has "an opportunity to act on the subject," Story, § 1551, at 410, and the Clause embodies a determination that a full session is needed to select and vet a replacement….

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"? …

Even the Solicitor General, arguing for a broader interpretation, acknowledges that there is a lower limit applicable to both kinds of recess. He argues that the lower limit should be three days by analogy to the Adjournments Clause of the Constitution. Tr. of Oral Arg. 11. That Clause says: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Art. I, § 5, cl. 4.

We agree with the Solicitor General that a 3–day recess would be too short. (Under Senate practice, "Sunday is generally not considered a day," and so is not counted for purposes of the Adjournments Clause. S. Doc. No. 101–28, F. Riddick & A. Frumin, Riddick's Senate Procedure: Precedents and Practices 1265 (hereinafter Riddick's).) The Adjournments Clause reflects the fact that a 3–day break is not a significant interruption of legislative business…. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power….

There are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days…. [W]hen 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. (It should go without saying—except that Justice SCALIA compels us to say it—that political opposition in the Senate would not qualify as an unusual circumstance.)

In sum, we conclude that the phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, § 5, cl. 4. 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. But that is not the only possible way to use the word.

Thomas Jefferson wrote that the Clause is "certainly susceptible of [two] constructions." Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 Papers of Thomas

Jefferson 433 (B. Oberg ed., 2009). It "may mean 'vacancies that may happen to be' or 'may happen to fall' " during a recess…. Similarly, when Attorney General William Wirt advised President Monroe to follow the broader interpretation, he wrote that the "expression seems not perfectly clear. It may mean 'happen to take place:' that is, 'to originate,' " or it "may mean, also, without violence to the sense, 'happen to exist.' " 1 Op. Atty. Gen. 631, 631–632 (1823). The broader interpretation, he added, is "most accordant with" the Constitution's "reason and spirit."…

In any event, the linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly…. And the broader reading, we believe, is at least a permissible reading of a " 'doubtful' " phrase. We consequently go on to consider the Clause's purpose and historical practice.

The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them….

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. Wirt explained that the "substantial purpose of the constitution was to keep these offices filled," and "if the President shall not have the power to fill a vacancy thus circumstanced, ... the substance of the constitution will be sacrificed to a dubious construction of its letter." 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."

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, see U.S. Const., Art. II, § 3. 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. 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….

Wirt thought considerations of character and politics would prevent Presidents from abusing the Clause in this way. 1 Op. Atty. Gen., at 634. 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…. 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.

While we concede that both interpretations carry with them some risk of undesirable consequences, we believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant. 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….

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

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

V

The third question concerns the calculation of the length of the Senate's "recess." On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene "pro forma session[s]" only, with "no business ... transacted," on every Tuesday and Friday from December 20, 2011, through January 20, 2012. 2011 S.J. 923. At the end of each pro forma session, the Senate would "adjourn until" the following pro forma session. Ibid. During that period, the Senate convened and adjourned as agreed. It held pro forma sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each pro forma session, it adjourned until the time and date of the next. Id., at 923–924; 158 Cong. Rec. S1–S11.

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. And we have held that "all matters of method are open to the determination" of the Senate, as long as there is "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained" and the rule does not "ignore constitutional restraints or violate fundamental rights."

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….

…. 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. See Tr. of Oral Arg. 69 (acknowledgment by counsel for amici Senators that if the Senate had left the Capitol and "effectively given up ... the business of legislating" then it might be in recess, even if it said it was not). 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. See Riddick's 1313. 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. 2011 S.J. 924. And that bill quickly became law. Pub.L. 112–78, 125 Stat. 1280….

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.' " Brief for Petitioner 64 (quoting Morrison v. Olson, 487 U.S. 654, 695 (1988)). 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. As the Solicitor General concedes, the 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.

Regardless, the 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

…. Justice SCALIA would render illegitimate thousands of recess appointments reaching all the way back to the founding era. More than that: Calling the Clause an "anachronism," he would basically read it out of the Constitution. He performs this act of judicial excision in the name of liberty. We fail to see how excising the Recess Appointments Clause preserves freedom. In fact, Alexander Hamilton observed in the very first Federalist Paper that "the vigour of government is essential to the security of liberty." The Federalist No. 1, at 5. And the Framers included the Recess Appointments Clause to preserve the "vigour of government" at times when an important organ of Government, the United States Senate, is in recess. Justice SCALIA's interpretation of the Clause would defeat the power of the Clause to achieve that objective.

The foregoing discussion should refute Justice SCALIA's claim that we have "embrace[d]" an "adverse-possession theory of executive power." Instead, as in all cases, we interpret the Constitution in light of its text, purposes, and "our whole experience" as a Nation. Missouri v. Holland, 252 U.S. 416, 433 (1920). And we look to the actual practice of Government to inform our interpretation.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

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

Except where the Constitution or a valid federal law provides otherwise, all "Officers of the United States" must be appointed by the President "by and with the Advice and Consent of the Senate." U.S. Const., Art. II, § 2, cl. 2. That general rule is subject to an exception: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Id., § 2, cl. 3….

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition.

Today's Court …. 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, so the Court should not "upset the compromises and working arrangements that the elected branches of Government themselves have reached."

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…. I concur in the judgment only.

I. Our Responsibility

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

First, the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." Clinton v. City of New York, 524 U.S. 417, 450 (1998) (KENNEDY, J., concurring). Those structural provisions reflect the founding generation's deep conviction that "checks and balances were the foundation of a structure of government that would protect liberty." Bowsher v. Synar, 478 U.S. 714, 722 (1986). It is for that reason that "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." Bond v. United States, 564 U.S. __, 131 S.Ct. 2355, 2365 (2011). Those decisions all rest on the bedrock principle that "the constitutional structure of our Government" is designed first and foremost not to look after the interests of the respective branches, but to "protec[t] individual liberty." Bond, supra, 131 S.Ct., at 2365.

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." Marbury v. Madison, 1 Cranch 137, 177 (1803). This Court does not defer to the other branches' resolution of such controversies; as Justice KENNEDY has previously written, our role is in no way "lessened" because it might be said that "the two political branches are adjusting their own powers between themselves." … Rather, policing the "enduring structure" of constitutional government when the political branches fail to do so is "one of the most vital functions of this Court." Public Citizen v. Department of Justice, 491 U.S. 440, 468 (1989) (KENNEDY, J., concurring in judgment)….

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." 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….

II. Intra–Session Breaks

The first question presented is whether "the Recess of the Senate," during which the President's recess-appointment power is active, is (a) the period between two of the Senate's formal sessions, or (b) any break in the Senate's proceedings. I would hold that "the Recess" is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made during the Senate's session….

A. Plain Meaning

…. An interpretation that calls for this kind of judicial adventurism cannot be correct. Indeed, if the Clause really did use "Recess" in its colloquial sense, then there would be no "judicially discoverable and manageable standard for resolving" whether a particular break was long enough to trigger the recess-appointment power, making that a nonjusticiable political question.

B. Historical Practice

…. 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….

[In sum:] 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; whereas individual Senators may have little interest in opposing Presidential encroachment on legislative prerogatives, especially when the encroacher is a President who is the leader of their own party. And when the President wants to assert a power and establish a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process. The majority's methodology thus all but guarantees the continuing aggrandizement of the Executive Branch.

III. Pre–Recess Vacancies

The second question presented is whether vacancies that "happen during the Recess of the Senate," which the President is empowered to fill with recess appointments, are (a) vacancies that arise during the recess, or (b) all vacancies that exist during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled….

A. Plain Meaning

As the majority concedes, "the most natural meaning of 'happens' as applied to a 'vacancy' ... is that the vacancy 'happens' when it initially occurs." The majority adds that this meaning is most natural "to a modern ear," ibid., but it fails to show that founding-era ears heard it differently. "Happen" meant then, as it does now, "[t]o fall out; to chance; to come to pass." 1 Johnson, Dictionary of the English Language 913. Thus, a vacancy that happened during the Recess was most reasonably understood as one that arose during the recess. It was, of course, possible in certain contexts for the word "happen" to mean "happen to be" rather than "happen to occur," as in the idiom "it so happens." But that meaning is not at all natural when the subject is a vacancy, a state of affairs that comes into existence at a particular moment in time…

B. Historical Practice

…. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority's interpretation….

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

IV. Conclusion

….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. Sad, but true: The Court's embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

I concur in the judgment only.

Review Questions and Explanations: *NLRB v. Noel Canning*

1. The majority decision could result in the invalidation of as many as 700 decisions of the NLRB made when the board majority consisted of recess appointments. Significant decisions and actions of the Consumer Financial Protection Board, taken during the directorship of another recess appointee, may also be called in to question.

2. Neither the majority opinion nor the concurrence in the judgment presents the argument for the executive branch: that congressional obstruction of presidential appointments might "disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." In what may be the most crucial point in the entire (lengthy) majority opinion, the Court says: "the Recess Appointments Clause is not designed to overcome serious institutional friction." In other words, the majority is unwilling to construe the clause to allow recess appointments where Congress is unwilling—as opposed to unable—to confirm appointments. Arguably, executive branch functioning just as much at stake in the case of congressional obstruction as in the case of congressional absence. Did the Court, in your view, give sufficient attention to this issue?

3. The majority says that it should interpret the recess appointments clause in a manner consistent with its function: to ensure that the executive branch can operate when Congress is not in session and thus able to confirm nominees to fill up executive branch positions. What reasons do you see for and against this approach compared to the concurring justices approach of relying on the supposed plain meaning of the text?

4. Now consider the concurring justices' textual approach. They argue that the plain meaning of the clause tells us that recess appointments may only be made during the major recess between the two major sessions of Congress, and only for vacancies arising during those two recesses. Scalia's full opinion contains a 3,000 word essay arguing that the "plain meaning" of recess is the period between formal sessions and excludes breaks in the midst of a session. On the meaning of "happens," Scalia's argument runs to 2,800 words. We have omitted these from the opinion excerpt for the sake of brevity. The opinion goes on to dispute the majority's historical arguments at great length, point by point (again, omitted for brevity). Finally, the concurrence in the judgment makes a big

point about the connection between separation of powers and individual liberty. Consider:

(a) If the meaning of the clause is plain, why does it take 5,800 words (a 20-page paper) to establish the point?

(b) Why engage with the majority's historical argument if that history is "of course, irrelevant"?

(c) If plain meaning is clear and dispositive of the issue, why the need to argue that "individual liberty" favors the concurring opinion's interpretation?

Consider whether the concurring justices may entertain doubts about the persuasiveness and force of their own plain meaning arguments.

5. On the individual liberty theme, what is the concurring opinion getting at? This theme is increasingly arising in opinions by the conservative wing of the Court, including *Bond v. United States* and *NFIB v. Sebelius*. Is the idea that there should be a presumption in separation of powers and federalism cases of resolving the issue in favor of "individual liberty"? If so, how are the justices defining liberty? Some would argue that regulation by definition infringes liberty; viewed in that light, any constitutional interpretation that makes regulation more difficult—by leaving executive branch appointments unfilled, for example—promotes liberty. Does the majority address this issue in any way?

C. Standing

1. Basic Doctrine

[For inclusion following *Lujan v. Defenders of Wildlife,* p. 630.]

Case note: **Clapper v. Amnesty International USA***, 133 S. Ct. 1138 (2013), involved a challenge to a provision of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a, which authorizes government surveillance of electronic communications of persons who are not U.S. citizens or residents believed to be located outside the United States. The plaintiffs were attorneys and human rights or media organizations, who claimed that the law deterred them from engaging in sensitive or privileged telephone or email communications with colleagues, clients, sources, and others located abroad. The government challenged the plaintiffs' standing. Plaintiffs argued that they suffered injury by having either to forgo the communications or to incur the considerable time and expense to conduct them in person to protect their confidentiality. A 5-4 majority of the Court (***Alito***, Roberts (CJ), Scalia, Kennedy, Thomas) rejected the plaintiffs' argument on the ground that the plaintiffs suffered no injury in fact. Viewed one way, the harm was too speculative: the plaintiffs could not show that the Government would actually target their communications; nor that, if it did so, the government would rely on § 1881a rather than another surveillance method; nor that, if both those conditions were met, the Foreign Intelligence Surveillance Court would permit the surveillance; nor that the Government would successfully intercept the communications. If the harm were instead viewed as the costs incurred by communicating in person rather than by telephone or email, the Court concluded that parties could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." The four dissenters (**Breyer**, Ginsburg, Sotomayor, Kagan) argued that the plaintiffs need only show "a high likelihood of future harm" and that they had met this standard.*

2. Organizational and Representational Standing

[For inclusion following *Raines v. Byrd*, p. 635.]

Note: Standing on appeal; standing to defend a challenged law. The two same-sex marriage cases brought before the Court in the 2012-13 term raised the question of whether someone other than the executive branch of the government has standing to appeal a lower court ruling striking down a law, when the government chooses not to defend the law.

In ***Hollingsworth v. Perry***, 133 S. Ct. 2652 (2013), a lesbian couple challenged a California constitutional amendment (known as "Proposition 8" after the ballot initiative that amended the constitution) which prohibited the state from recognizing same-sex marriages. The district court struck down the ban, holding that the Fourteenth Amendment due process and equal protection clauses prohibited states from denying homosexual couples the right to marry. The state, under the administration of a newly-elected governor, declined to further defend the law, and decided not to appeal; instead an appeal was taken by a citizen group of supporters of Proposition 8. The Ninth Circuit affirmed, and the law's supporters petitioned for certiorari. By a 5-4 majority, the U.S. Supreme Court ruled that the petitioners lacked standing to pursue the appeal, and ordered the Ninth Circuit decision vacated and the cert petition dismissed. As a result, the district court judgment striking down Proposition 8 was thereby left intact. (Note that the district court decision covered only California and is not a binding precedent elsewhere.) The 5-4 majority decision (***Roberts*** (CJ), Scalia, Ginsburg, Breyer, Kagan) reasoned that the petitioners could not claim a concrete particularized injury by the judgment striking down the law, but instead held an interest in the case that was no more than a generalized grievance, which is insufficient to confer Article III standing. The dissenters (***Kennedy***, Thomas, Alito, Sotomayor) argued that the Court should have recognized the petitioners' standing. California law authorized the petitioners to pursue the appeal in the state's stead where the state executive declined to defend the law, and the Court should have deferred to state law which effectively invested the petitioners' with the state's interest in defending its laws.

A somewhat similar issue was presented by ***United States v. Windsor***, 133 S. Ct. 2675 (2013). There, the surviving spouse of a same-sex couple whose marriage had been legally recognized in New York challenged the Defense of Marriage Act's provision denying recognition to same-sex marriages for purposes of all federal laws. Under this provision, the spouse would have to pay federal estate taxes that would not have been due were the couple's marriage deemed valid under federal law. The district court held the law unconstitutional and the United States appealed. The stance adopted by the Obama administration as litigant was unusual: while the administration submitted formal arguments agreeing with the plaintiff that DOMA was unconstitutional, it deemed itself bound to continue to enforce the law as written, and thus withheld plaintiff's tax refund. The Court, in a 5-4 decision (***Kennedy***, Ginsburg, Breyer, Sotomayor, Kagan), held that the Treasury payment required of the government by the district court judgment was sufficient to create a cognizable injury to the government sufficient to create standing to appeal the judgment, notwithstanding its agreement that the provision of DOMA was unconstitutional. While the potentially collusive, and certainly unusual situation of government agreement with the plaintiff on the merits raised prudential standing concerns, those were not strict Article III limitations and could give way to countervailing factors. Here, a bipartisan group of members of Congress filed amicus brief defending the law, somewhat obviating the prudential problem of a lack of adverseness in the litigation. The majority went on to reach the merits and held the provision of DOMA unconstitutional. (The merits opinion is excerpted in the supplementary material for Chapter 8.) The four dissenters (***Roberts*** (CJ), ***Scalia***, Thomas, ***Alito***) argued that the government's agreement on the merits with the position of its adversary Windsor undermined its standing to pursue the appeal.

There are at least two key takeaway points from these cases. First, the Court makes clear in both cases that the requirement of standing must exist at all stages of the litigation, both at the trial level and on appeal. Moreover, standing on appeal is evaluated by requiring the appellant (or the cert petitioner before the Supreme Court) to establish standing to take the appeal, even if the appellant was the defendant in the trial court – and hence did not have to establish standing at that stage.

Second, the cases illustrate a recurring standing problem where the government (federal or state, depending on whose law is at issue) does not wish to defend the law. At both the federal and state levels, the executive branch is charged with the duty to execute the laws of its respective legislature. But the chief executive – the President or governor – might believe the law is unconstitutional. The question of whether the chief executive may make such an independent determination, and whether his duty to "faithfully execute the law" requires continued adherence to laws he deems unconstitutional, is a significant, and unresolved question of executive power and duty in constitutional law (discussed in Chapter 3 of the main volume). The Obama administration chose a middle path, arguing against DOMA in court while continuing to enforce it.

Windsor and *Hollingsworth* reach seemingly different outcomes, but are at least arguably distinguishable. Can you state a set of standing principles that harmonizes the two cases?

2016 SUPPLEMENT – CHAPTER 7: SUBSTANTIVE DUE PROCESS

D. Fundamental Rights and Personal Liberties

Insert at p. 748, after the Gonzales v. Carhart *Case Note:*

Guided Reading Questions: *Whole Woman's Health v. Hellerstedt*

1. The majority and the dissenting justices in *Whole Woman's Health* disagree about how to apply the standard of review set out in *Casey*. Take a moment before reading *Whole Woman's Health* to review *Casey* and reflect upon how you think the undue burden standard should be applied.

2. More specifically, consider two questions: 1) how much should courts defer to legislative determinations about what is necessary to protect the state's legitimate interest in women's health; and 2) when determining whether a burden is "undue," should the purported benefits of the law be considered, or just the severity of the burden [in other words, is undueness solely about severity, or does proportionality matter as well?].

Whole Woman's Health v. Hellerstedt
136 S.Ct. 2292 (2016)

Majority: *Breyer*, Kennedy, Ginsburg, Sotomayor, Kagan

Concurrence: *Ginsburg* (omitted)

Dissent: *Thomas*, ***Alito*** (omitted), Roberts (CJ)

JUSTICE BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 878 (1992), a plurality of the Court concluded that there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect*" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." (Emphasis added.) The plurality added that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Ibid*.

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the *"admitting-privileges requirement,*" says that "[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at

which the abortion is performed or induced." This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital." 38 Tex. Reg. 6546 (2013). The second provision, which we shall call the "*surgical- center requirement,*" says that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers."

We conclude that neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes an undue burden on abortion access, *Casey*, *supra*, at 878 (plurality opinion), and each violates the Federal Constitution.

…

In July 2013, the Texas Legislature enacted House Bill 2 (H. B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect.

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would "'screen out' untrained or incompetent abortion providers." The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." *Id.*, at 598. The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." …

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey.* We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade*, 410 U. S. 113, 150 (1973). But, we added, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice can- not be considered a permissible means of serving its legitimate ends." *Casey,* 505 U. S., at 877 (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id*., at 878.

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an

abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.,* at 587 (citing *Gonzales* v. *Carhart,* 550 U. S. 124, 163 (2007)).

The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. [internal citation omitted]. And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, *e.g., Williamson* v. *Lee Optical of Okla., Inc.,* 348 U. S. 483, 491 (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey,* for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. [] And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some of the legislative findings. *Id.,* at 166. In these circumstances, we said, "[u]ncritical deference to Congress' factual findings . . . is inappropriate." *Ibid.*

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). *Id*., at 149–150. For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

Undue Burden—Admitting-Privileges Requirement

Turning to the lower courts' evaluation of the evidence, we first consider the

admitting-privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." The new law changed this requirement by requiring that a "physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." …

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32–37. But the District Court found that it brought about no such health-related benefit. The court found that "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Thus, there was no significant health-related problem that the new law helped to cure.

…

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health. We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. See Tr. of Oral Arg. 47.

…

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey*, 505 U. S., at 877 (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement's effective date. See App. 229–230; cf. Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 14 (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is "unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face"). Eleven more closed on the day the admitting- privileges requirement took effect. See App. 229–230; Tr. of Oral Arg. 58.

…

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the

"number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." See *Casey*, 505 U.S., at 885–887 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. *id.,* at 895 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

…

Undue Burden—Surgical-Center Requirement

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements; a quality assurance program; personnel policies and staffing requirements; physical and environmental requirements; infection control standards; disclosure requirements; patient-rights standards; and medical- and clinical-services standards, including anesthesia standards. These requirements are policed by random and announced inspections, at least annually, as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations.

H. B. 2 added the requirement that an "abortion facility" meet the "minimum standards . . . for ambulatory surgical centers" under Texas law. The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least "an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed," as well as "a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility" for facilities that pro- vide moderate sedation, such as most abortion facilities. Facilities must include a full surgical suite with an operating room that has "a clear floor area of at least 240 square feet" in which "[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet." There must be a preoperative patient holding room and a postoperative recovery suite. The former "shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite," and the latter "shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge". Surgical centers must meet numerous other spatial requirements, see generally §135.52, including specific corridor widths. Surgical centers must also have an advanced heating, ventilation, and air conditioning system, and must satisfy particular

piping system and plumbing requirements. Dozens of other sections list additional requirements that apply to surgical centers. See generally §§135.1–135.56.

There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. The District Court found that "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical- center facilities." The court added that women "will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." *Ibid.* And these findings are well supported.

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would al- most always arise only after the patient has left the facility. See *supra*, at 23; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, *e.g.*, *id.,* at 223–224, 254, 275–279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). *Id.,* at 272. Nationwide, childbirth is 14 times more likely than abortion to result in death, *ibid.*, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. *Id*., at 276–277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortal- ity rate for abortion). Medical treatment after an incom- plete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grand- fathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grand- fathers nor provides waivers for any of the facilities that perform abortions. 46 F. Supp. 3d, at 680–681; see App. 184. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found." *Doe*, 410 U. S., at 194 (internal quotations omitted).

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement "will not [provide] better care or . . . more frequent positive outcomes." *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in

the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." We take this statement as a finding that these few facilities could not "meet" that "demand." The Court of Appeals held that this finding was "clearly erroneous." … Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court's finding.

…

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. …We agree with the District Court that the surgical- center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so. …

For these reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court's troubling tendency "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue."

… Today's opinion also reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, a plurality of this Court invented the "undue burden" standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an "undue burden" on a woman's ability to choose to have an abortion, meaning that it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.,* at 877. *Casey* thus instructed courts to look to whether a law substantially impedes women's access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power" to regulate aspects of abortion procedures, "all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales* v. *Carhart*, 550 U. S. 124, 158 (2007).

I remain fundamentally opposed to the Court's abortion jurisprudence. Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer.". Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record them- selves. *Ibid.* Finally, even if a law imposes no "substantial obstacle" to women's access to abortions, the law now must have more than a "reasonabl[e] relat[ion] to . . . a legitimate state interest." *Ibid.* (internal quotation marks omitted). These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

First, the majority's free-form balancing test is contrary to *Casey*. When assessing Pennsylvania's recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, "so it cannot be said that the requirements serve no purpose other than to make abortions more difficult." 505 U. S., at 901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. *Ibid*. Contrary to the majority's statements, *Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, either. Pennsylvania's spousal notification requirement, the plurality said, imposed an undue burden because findings established that the requirement would "likely . . . prevent a significant number of women from obtaining an abortion"—not because these burdens out- weighed its benefits. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. …

Second, by rejecting the notion that "legislatures, and not courts, must resolve questions of medical uncertainty," the majority discards another core element of the *Casey* framework. Before today, this Court had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U. S., at 163. This Court emphasized that this "traditional rule" of deference "is consistent with *Casey*." *Ibid.* This Court underscored that legislatures should not be hamstrung "if some part of the medical community were disinclined to follow the proscription." And this Court concluded that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Ibid*. This Court could not have been clearer: Whenever medical justifications for an abortion restriction are debatable, that "provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden." *Gonzales,* 550 U. S., at 164. Otherwise, legislatures would face "too exacting" a standard. *Id.,* at 166.

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases "placed considerable weight upon the evidence and argument presented in judicial proceedings." *Ante,* at 20. But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science. 505 U. S., at 888–894 (majority opinion). And while *Gonzales* observed that courts need not blindly accept all

legislative findings, that does not help the majority. *Gonzales* refused to accept Congress' finding of "a medical consensus that the prohibited procedure is never medically necessary" because the procedure's necessity was debated within the medical community. 550 U. S., at 165–166. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment. See *id.,* at 164.

Finally, the majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion. *Ante,* at 19–20. "Where [the State] *has a rational basis to act* and it does not impose an undue burden," this Court previously held, "the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the un- born." *Gonzales*, *supra*, at 158 (emphasis added); see *Casey*, *supra,* at 878 (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, *ante,* at 20, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century. …

The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion. One searches the majority opinion in vain for any acknowledgment of the "premise central" to *Casey*'s rejection of strict scrutiny: "that the government has a legitimate and substantial interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures. *Gonzales*, *supra.* Meanwhile, the majority's undue- burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion. Moreover, by second-guessing medical evidence and making its own assessments of "quality of care" issues, the majority reappoints this Court as "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States." *Gonzales*, *supra,* at 164 (internal quotation marks omitted). And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster and what "commonsense inferences" of an undue burden this Court will identify next.

The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it "rational basis," intermediate, strict, or something else—is increasingly a meaning- less formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960's did the Court begin in earnest to speak of "strict scrutiny" versus reviewing legislation for mere rationality, and to develop the contours of these tests. In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. [Citations omitted]. Then the tiers of

scrutiny proliferated into ever more gradations. See, *e.g., Craig,* 429 U. S., at 197–198 (intermediate scrutiny for sex-based classifications); *Lawrence* v. *Texas*, 539 U. S. 558, 580 (2003) (O'Connor, J., concurring in judgment) ("a more searching form of rational basis review" applies to laws reflecting "a desire to harm a politically unpopular group"); *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curium*) (applying "'closest scrutiny'" to campaign-finance contribution limits). *Casey*'s undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" has long been apparent. The Constitution does not prescribe tiers of scrutiny. The three basic tiers—"rational basis," intermediate, and strict scrutiny—"are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." *Id.* But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. All the State apparently needs to show to survive strict scrutiny is a list of aspirational educational goals (such as the "cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry") and a "reasoned, principled explanation" for why it is pursuing them—then this Court defers. *Fisher* v. *University of Tex. at Austin*, *ante,* at 7, 12 (internal quotation marks omitted). Yet the same State gets no deference under the undue-burden test, despite producing evidence that abortion safety, one rationale for Texas' law, is medically debated. See *Whole Woman's Health* v. *Lakey*, 46 F. Supp. 3d 673, 684 (WD Tex. 2014). Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review.

These more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less- preferred rights. Meanwhile, the Court selectively applies rational-basis review— under which the question is supposed to be whether "any state of facts reasonably may be conceived to justify" the law — with formidable toughness.

These labels now mean little. Whatever the Court claims to be doing, in practice it is treating its "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Williams-Yulee*, *supra,* at ___ (slip op., at 1) (BREYER, J., concurring). The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case.

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe* v. *Wade*, 410 U. S. 113, as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an un- workable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See *Lochner* v. *New York*, 198 U. S. 45 (1905). The

Court in 1937 repudiated *Lochner*'s foundations. See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 386–387, 400 (1937). But the Court then created a new taxonomy of preferred rights. In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153 (1938).

Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. See *ibid.* The footnote's first paragraph suggested that the presumption of constitutionality that ordinarily attaches to legislation might be "narrower . . . when legislation appears on its face to be within a specific prohibition of the Constitution." Its second paragraph appeared to question "whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [14th] Amendment than are most other types of legislation." *Ibid.* And its third and most familiar paragraph raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Ibid.*

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution. As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe*, 410 U. S., at 162–164, which hardly implicate "discrete and insular minorities."

… Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object. But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

Review Questions and Explanations: *Whole Woman's Health v. Hellerstedt*

1. Do you think the majority or the dissent better captures the intent of the *Casey* plurality?

2. To what extent should courts defer to legislative judgements about factual matters? Another way to think about this issue is to consider the extent to which courts should be on the alert for pretext: the assertion of constitutional reasons to mask blatantly unconstitutional ones. This comes up on many areas of constitutional law, including issues involving race, gender, and religious liberties.

3. Justice Thomas' dissent critiques the tiered system of judicial review ushered in by *Carolene Products*. Justice Stevens also has expressed concern about the formal structure of tiered review (see *City of Cleburne v. Cleburne Living Center,* Chapter 8). Do you agree that the black letter law of tiered review is an artificial construction? If so, is that a feature or a bug? Consider the various ways in which tiered review does and does not structure or constrain judicial decision making.

2016 SUPPLEMENT – CHAPTER 8: EQUAL PROTECTION

C. Strict Scrutiny and Race Discrimination

* * *

2. Affirmative Action

[*Insert at p. 858 after "Recap: Affirmative Action"*]

What does it mean to apply "strict scrutiny" in affirmative action cases? In *Fischer v. University of Texas*, decided by the Court in 2013 ("*Fisher I*"), unsuccessful college applicant Abigail Fisher challenged the race-conscious admissions system used by the University of Texas. Many observers thought the Court would use the case to overrule *Grutter* and invalidate any use of race in college admissions. Instead, in a 7 to 1 decision authored by Justice Kennedy, the Court remanded the case with an instruction to the lower court to apply what appeared to be a more restrictive version of strict scrutiny than previously required by the Court in the university admissions setting. The "new" test arguably tightened both the "compelling interest" and the "narrowly tailored" prongs of strict scrutiny review. Educational diversity is a "compelling interest," Justice Kennedy wrote, only if a court is satisfied "that there is a reasoned, principled explanation for the academic decision" that racial diversity will enhance the students' educational experience. As for the narrow tailoring prong, Justice Kennedy instructed the lower court to find the Texas plan sufficiently narrowly tailored only if a court engaging in completely non-deferential review, finds the plan "necessary" to achieve the diversity required to accomplish the educational goal. The reviewing Court, he wrote, must "ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."

The Fifth Circuit again upheld the University of Texas admissions plan, and the case returned to the Supreme Court.

Guided Reading Questions: *Fisher v. University of Texas at Austin ("Fisher II")*

1. Consider whether *Fisher II*:

   a) changes or reaffirms any aspects of the law from *Bakke* and *Grutter*;

   b) applies stricter review in analyzing the compelling interest or narrow tailoring prongs of strict scrutiny.

2. What facts are persuasive to the Court that UT has made a persuasive case that the race-conscious part of the admissions plan meets strict scrutiny?

3. In meeting strict scrutiny, what seems to be the relative importance of undertaking a study of diversity at all, versus producing data that strongly supports the claims about the educational benefits of diversity? How much deference does the Court give to UT on the claimed educational benefits of diversity?

Fisher v. University of Texas at Austin ("Fisher II")

136 S.Ct. 2198 (2016)

Majority: ***Kennedy***, Ginsburg, Breyer and Sotomayor

Dissents: ***Thomas, Alito,*** Roberts (CJ)

(Justice Kagan took no part in the consideration or decision of the case.)

JUSTICE KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See Hopwood v. Texas, 78 F.3d 932, 934–935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with Hopwood, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to Hopwood as well. It enacted H.B. 588, commonly known as the Top Ten Percent Law. Tex. Educ.Code Ann. § 51.803 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of

their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of Grutter v. Bollinger, 539 U.S. 306, and Gratz v. Bollinger, 539 U.S. 244. In Gratz, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. In Grutter, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. In upholding this nuanced use of race, Grutter implicitly overruled Hopwood's categorical prohibition.

In the wake of Grutter, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body ... to all of the University's undergraduate students." The University concluded that its admissions policy was not providing these benefits.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of Grutter, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in Grutter for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1–to–6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the

applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. The Admissions Office also undertakes regular "reliability analyses" to "measure the frequency of readers scoring within one point of each other." Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.

Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants' scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS.

Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant's background, can alter an applicant's PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant's AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, Fisher v. University of Tex. at Austin, 570 U.S. ——, 133 S.Ct. 2411 (2013) (Fisher I), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. This Court granted certiorari for a second time, and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989), "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny." Strict scrutiny requires the university to demonstrate with clarity that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.' "

Second, Fisher I confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' " Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."

Third, Fisher I clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. A university, Fisher I explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," Grutter, 539 U.S., at 339, it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." Fisher I, 570 U.S., at ——, 133 S.Ct., at 2420….

III

The University's program is sui generis. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the

school used race-conscious holistic review to select its entire incoming class, as was the case in Grutter.

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.

In an ordinary case, this evidentiary gap perhaps could be filled by a remand to the district court for further factfinding. When petitioner's application was rejected, however, the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years. While studies undertaken over the eight years since then may be of significant value in determining the constitutionality of the University's current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008. If the Court were to remand, therefore, further factfinding would be limited to a narrow 3–year sample, review of which might yield little insight.

Furthermore, [since] the University lacks any authority to alter the role of the Top Ten Percent Plan …. [it] had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before Fisher I clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review.

Under the circumstances of this case, then, a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources. Petitioner long since has graduated from another college, and the University's policy—and the data on which it first was based—may have evolved or changed in material ways.

The fact that this case has been litigated on a somewhat artificial basis, furthermore, may limit its value for prospective guidance. The Texas Legislature, in enacting the Top Ten Percent Plan, cannot much be criticized, for it was responding to Hopwood, which at the time was binding law in the State of Texas. That legislative response, in turn, circumscribed the University's discretion in crafting its admissions policy. These circumstances refute any criticism that the University did not make good-faith efforts to comply with the law.

That does not diminish, however, the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the

educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come. Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University …. must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society."

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of

leaders with legitimacy in the eyes of the citizenry.' " Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. The University's 39–page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." … Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. See, e.g., post, at 2240 (opinion of ALITO, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year Grutter was decided, 267 African–American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African–American students enrolled in them, and 27 percent had only one African–

American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African–American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African–American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African–American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Perhaps more significantly, in the wake of Hopwood, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. Grutter.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front

and center stage." Fisher I, 133 S.Ct., at 2433 (GINSBURG, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." Ibid. Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. … At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks. … Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Sweatt v. Painter, 339 U.S. 629, 634 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." United States v. Lopez, 514 U.S. 549, 581 (1995) (KENNEDY, J., concurring); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). … The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have

undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies. The judgment of the Court of Appeals is affirmed.

JUSTICE THOMAS, dissenting.

I join Justice ALITO's dissent…. I write separately to reaffirm that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." Fisher I, (THOMAS, J., concurring). "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." That constitutional imperative does not change in the face of a "faddish theor[y]" that racial discrimination may produce "educational benefits." Id…. I would overrule Grutter and reverse the Fifth Circuit's judgment.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Something strange has happened since our prior decision in this case. See (Fisher I). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. It pointed to a study showing that African–American, Hispanic, and Asian–American students were underrepresented in many classes. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in

administering the "holistic" component of its plan, make any effort to determine whether an African–American, Hispanic, or Asian–American student is likely to enroll in classes in which minority students are underrepresented. …

At times, UT has claimed that its plan is needed to achieve a "critical mass" of African–American and Hispanic students, but it has never explained what this term means. … This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in Fisher I.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits the wrong kind of African–American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African–American or Hispanic. As UT put it in its brief in Fisher I, the race-based component of its admissions plan is needed to admit "[t]he African–American or Hispanic child of successful professionals in Dallas."

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help disadvantaged students….

I

Over the past 20 years, UT has frequently modified its admissions policies, and it has generally employed race and ethnicity in the most aggressive manner permitted under controlling precedent…. In 2000, UT announced that its "enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the Hopwood decision prohibited the consideration of race in admissions policies." And in 2003, UT proclaimed that it had "effectively compensated for the loss of affirmative action." By 2004—the last year under the holistic, race-neutral AI/PAI system—UT's entering class was 4.5% African–American, 17.9% Asian–American, and 16.9% Hispanic. The 2004 entering class thus had a higher percentage of African–Americans, Asian–Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.

Notwithstanding these lauded results, UT leapt at the opportunity to reinsert race into the process.… In Grutter, the Court warned that a university contemplating the consideration of race as part of its admissions process must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Nevertheless, on the very day Grutter was handed down, UT's president announced that "[t]he University of Texas at Austin will modify its admissions procedures" in light of Grutter, including by "implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs." UT purports to have later engaged in "almost a year of deliberations," id., but there is no evidence that the reintroduction of race into the admissions process was anything other than a foregone conclusion following the president's announcement….

Although UT claims that race is but a "factor of a factor of a factor of a factor," id., at 608, UT acknowledges that "race is the only one of [its] holistic factors that appears on the cover of every application." . "Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation." .Consideration of race therefore pervades every aspect of UT's admissions process. …

Notwithstanding the omnipresence of racial classifications, UT claims that …. "The university doesn't keep any statistics on how many students are affected by the consideration of race in admissions decisions," and it "does not know how many minority students are affected in a positive manner by the consideration of race." …. UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.

II

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (KENNEDY, J., concurring in part and concurring in judgment). … "[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications ... be subjected to the most rigid scrutiny." Fisher I…. The "higher education dynamic does not change" this standard. Id….

In short, in "all contexts," racial classifications are permitted only "as a last resort," when all else has failed, Croson, supra, at 519 (opinion of KENNEDY, J.). "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. Fisher I. To meet this burden, the government must "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.' " Id.

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny. … UT has not explained in anything other than the vaguest terms what it means by "critical mass." … It defines "critical mass" as "an adequate representation of minority students so that the ... educational benefits that can be derived from diversity can actually happen," and it declares that it "will ... know [that] it has reached critical mass" when it "see[s] the educational benefits happening." In other words: Trust us.

[According to the majority], UT has articulated the following "concrete and precise goals": "the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry."

These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, then the narrow tailoring inquiry is

meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review….

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," Brief for Respondents 15, it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

First, both UT and the majority cite demographic data as evidence that African–American and Hispanic students are "underrepresented" at UT and that racial preferences are necessary to compensate for this underrepresentation. But neither UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass.

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African–Americans and Hispanics in Texas, where African–Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African–American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)? … UT's extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian–Americans, because Hispanics, but not Asian–Americans, are underrepresented at UT when compared to the demographics of the State….

The majority, for its part, claims that "[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives." But even if UT merely "view[s] the demographic disparity as cause for concern," and is seeking only to reduce—rather than eliminate—the disparity, that undefined goal cannot be properly subjected to strict scrutiny. In that case, there is simply no way for a court to know what specific demographic interest UT is pursuing, why a race-neutral alternative could not achieve that interest, and when that demographic goal would be satisfied….

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity…. UT now equivocates, disclaiming any discrete interest in classroom diversity. Instead, UT has taken the position that the lack of classroom diversity was merely a "red flag that UT had not yet fully realized" "the constitutionally permissible educational benefits of diversity." But UT has failed to identify the level of classroom diversity it deems sufficient, again making it impossible to apply strict scrutiny….

[I]f UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best "nuanced quantitative data" supporting UT's position, demonstrated that classroom diversity was more lacking for students classified as Asian–American than for

those classified as Hispanic…. While both the majority and the Fifth Circuit rely on UT's classroom study, they completely ignore its finding that Hispanics are better represented than Asian–Americans in UT classrooms. In fact, they act almost as if Asian–American students do not exist. …

In addition to demonstrating that UT discriminates against Asian–American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories…. For example, students labeled "Asian American," Supp. App. 26a, seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population." It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. ... As long as there are a sufficient number of "Asian Americans," UT is apparently satisfied.

UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African–American," "Hispanic," "Asian American," "Native American," or "White." And UT evidently labels each student as falling into only a single racial or ethnic group, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010. A recent survey reported that 26% of Hispanics and 28% of Asian–Americans marry a spouse of a different race or ethnicity. UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. …

UT also alleges—and the majority embraces—an interest in avoiding "feelings of loneliness and isolation" among minority students. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel "isolated." This vague interest cannot possibly satisfy strict scrutiny….

D

Even assuming UT is correct that, under Grutter, it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. … Here, there is no evidence that race-blind, holistic review would not achieve UT's goals at least "about as well" as UT's race-based policy. In addition, UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors….

The fact that UT's racial preferences are unnecessary to achieve its stated goals is further demonstrated by their minimal effect on UT's diversity. In 2004, when race was not a factor, 3.6% of non-Top Ten Percent Texas enrollees were African–American and 11.6% were Hispanic. It would stand to reason that at least the same percentages of African–American and Hispanic students would have been admitted through holistic review in 2008 even if race were not a factor. If that assumption is correct, then race was

determinative for only 15 African–American students and 18 Hispanic students in 2008 (representing 0.2% and 0.3%, respectively, of the total enrolled first-time freshmen from Texas high schools)….

IV

It is important to understand what is and what is not at stake in this case. What is not at stake is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account. … Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

Review Questions and Explanations: *Fisher II*

1. Does *Fisher II* provide more doctrinal clarity than *Grutter*? What aspects, if any, of the majority opinion offer forward-looking guidance to universities that don't employ a percentage plan? What guidance does *Fisher* offer to University of Texas going forward? Consider whether it makes sense to continue applying strict scrutiny to university admissions procedures at the level of detail that strict scrutiny seems to require.

2. Several liberal academic commentators published op-eds and blog posts after *Fisher II* was announced contending that the decision represented a turning point and a great victory for affirmative action. Do you agree, or was that just politico-legal spin? To what extent is such an argument based on doctrine versus Court-politics?

3. The Fifth Circuit, the Texas legislature, and perhaps the *Fisher II* dissenters seem to think that the Texas 10% plan is "race neutral." If not, is it constitutionally preferable to a Michigan-type "holistic" plan? Does it meet strict scrutiny?

4. The Alito dissent attacks the University for "crude" racial categorization that lumps together diverse subgroups within categories like "African American," "Hispanic" and "Asian American," while also ignoring bi- or multi-racial backgrounds. Is the argument that the University should be more fine-grained or racially sensitive in its admissions? Or that affirmative action is necessarily precluded because no institution can be sufficiently fine-grained in making racial distinctions to meet strict scrutiny? This seems to harken back to the Powell opinion in *Bakke*, suggesting that racial differences are too complex for government to handle.

5. Justice Thomas continues to assert that affirmative action is never constitutional when undertaken voluntarily and proactively by governmental institutions. (Presumably, it would be constitutional for a court to order race conscious remedies for race

discrimination proven in litigation.) Is the position espoused by Justice Alito (and joined by Roberts) different as a practical matter, or does it differ in name only?

Consider: (1) Does the Alito dissent provide a template under which a university could pursue an affirmative action plan that would meet the dissent's understanding of strict scrutiny?

(2) Would the Michigan Law School plan in *Grutter* meet the Alito standard for strict scrutiny?

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Guided Reading Questions: *Schuette v. Coalition to Defend Affirmative Action*

1. What is the Equal Protection claim asserted by the claimants? Be precise in your answer.

2. What is the "political process" doctrine? Does the majority reject it?

3. Justice Sotomayor argues that *Gomillion, Romer,* and *LULAC* are on-point precedents for the case at bar. The majority disagrees. Who has the better argument on this point?

4. Is Justice Sotomayor correct that the majority is re-writing *Hunter* and *Seattle* when it treats them as "really" being cases involving covert de jure discrimination. If she is, does it matter? In other words, how improper is it for a Court to read new doctrines back into prior cases? Consider how the Warren Court morphed cases sounding primarily in property rights, such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, into the foundation for modern privacy law.

Schuette v. Coalition to Defend Affirmative Action

572 U.S. __, 134 S. Ct 1623 (2014)

Plurality: *Kennedy,* Roberts (CJ), Alito

Concurrence: *Roberts* (CJ)

Concurrences in the judgment: *Scalia*, Thomas; ***Breyer***

Dissent: *Sotomayor*, Ginsburg

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join. JUSTICE KAGAN took no part in the consideration or decision of this case.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003 the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in Gratz v. Bollinger, 539 U. S. 244. The law school admission plan was addressed in Grutter v. Bollinger, 539 U. S. 306. Each admissions process permitted the explicit consideration of an applicant's race. In Gratz, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. In Grutter, the Court found no constitutional flaw in the law school admission plan's more limited use of race-based preferences.

In response to the Court's decision in Gratz, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, §26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

"(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

"(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

"(3) For the purposes of this section 'state' includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1." …

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in Fisher v. University of Texas at Austin. In Fisher, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in Fisher, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions. …

Though it has not been prominent in the arguments of the parties, this Court's decision in Reitman v. Mulkey, 387 U. S. 369 (1967), is a proper beginning point for discussing the controlling decisions. In Mulkey, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. Two different cases gave rise to Mulkey. In one a couple could not rent an apartment, and in the other a couple were evicted from their apartment. Those adverse actions were on account of race. In both cases the complaining parties were barred, on account of race, from invoking the protection of California's statutes; and, as a result, they were unable to lease residential property. This Court concluded that the state constitutional provision was a denial of equal protection. The Court agreed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice. The Court noted the "immediate design and intent" of the amendment was to "establis[h] a purported constitutional right to privately discriminate." Id., at 374 (internal quotation marks omitted and emphasis deleted). The Court agreed that the amendment "expressly authorized and constitutionalized the private right to discriminate." Id., at 376. The effect of the state constitutional amendment was to "significantly encourage and involve the State in private racial discriminations." Id., at 381. In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding. Id., at 387. The dissent reasoned that California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination. Id., at 389. That dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury.

The next precedent of relevance, Hunter v. Erickson, 393 U. S. 385 (1969), is central to the arguments the respondents make in the instant case. In Hunter, the Court for the first time elaborated what the Court of Appeals here styled the "political process" doctrine. There, the Akron City Council found that the citizens of Akron consisted of "'people of different race[s], . . . many of whom live in circumscribed and segregated areas, under sub-standard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'" Id., at 391. To address the problem, Akron enacted a fair housing ordinance to prohibit that sort of discrimination. In response, voters amended the city charter to overturn the ordinance and to require that any additional antidiscrimination housing ordinance be approved by referendum. But most other ordinances "regulating the real property market" were not subject to those threshold requirements. Id., at 390. The plaintiff, a black woman in Akron, Ohio, alleged that her real estate agent could not show her certain residences because the owners had specified they would not sell to black persons.

Central to the Court's reasoning in Hunter was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in "'unhealthful, unsafe, unsanitary and overcrowded conditions.'" Id., at 391. The Court stated: "It is against this background that the referendum required by [the charter amendment] must be assessed." Ibid. Akron attempted to characterize the charter amendment "simply as a public decision to move slowly in the delicate area of race relations" and as a means "to allow the people of Akron to participate" in the decision. Id., at 392. The Court rejected Akron's flawed "justifications for its discrimination," justifications that by their own terms had the effect

of acknowledging the targeted nature of the charter amendment. Ibid. The Court noted, furthermore, that the charter amendment was unnecessary as a general means of public control over the city council; for the people of Akron already were empowered to overturn ordinances by referendum. Id., at 390, n. 6. The Court found that the city charter amendment, by singling out antidiscrimination ordinances, "places special burden on racial minorities within the governmental process," thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority. Id., at 391. Justice Harlan filed a concurrence. He argued the city charter amendment "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." Id., at 395. But without regard to the sentence just quoted, Hunter rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. The facts in Hunter established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in Mulkey and Hunter, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

Seattle is the third case of principal relevance here. There, the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools. Voters who opposed the school board's busing plan passed a state initiative that barred busing to desegregate. The Court first determined that, although "white as well as Negro children benefit from" diversity, the school board's plan "inures primarily to the benefit of the minority." 458 U. S., at 472. The Court next found that "the practical effect" of the state initiative was to "remov[e] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests" be- cause advocates of busing "now must seek relief from the state legislature, or from the statewide electorate." Id., at 474. The Court therefore found that the initiative had "explicitly us[ed] the racial nature of a decision to deter- mine the decisionmaking process." Id., at 470 (emphasis deleted).

Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in Mulkey and Hunter. Although there had been no judicial finding of de jure segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that "permitted white students to transfer out of black schools while restricting the transfer of black students into white schools." Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U. S. 701, 807–808 (2007) (BREYER, J., dissenting). In 1977, the National Association for the Advancement of Colored People (NAACP) filed a complaint with the Office for Civil Rights, a federal agency. The NAACP alleged that the school board had maintained a system of de jure segregation. Specifically, the complaint alleged "that the Seattle School Board had created or perpetuated unlawful racial segregation through, e.g., certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts." Id., at 810. As part of a settlement with the Office for Civil Rights, the school board implemented the "Seattle Plan," which used busing and

mandatory reassignments between elementary schools to reduce racial imbalance and which was the subject of the state initiative at issue in Seattle. See 551 U. S., at 807–812.

As this Court held in Parents Involved, the school board's purported remedial action would not be permissible today absent a showing of de jure segregation. Id., at 720–721. That holding prompted JUSTICE BREYER to observe in dissent, as noted above, that one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools. In all events we must understand Seattle as Seattle understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior de jure segregation." 458 U. S. at 472, n. 15. In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and Seattle must be understood on that basis. Ibid. Seattle involved a state initiative that "was carefully tailored to interfere only with desegregative busing." Id., at 471. The Seattle Court, accepting the validity of the school board's busing remedy as a predicate to its analysis of the constitutional question, found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit.

The broad language used in Seattle, however, went well beyond the analysis needed to resolve the case. The Court there seized upon the statement in Justice Harlan's concurrence in Hunter that the procedural change in that case had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 385 U. S., at 395. That language, taken in the context of the facts in Hunter, is best read simply to describe the necessity for finding an equal protection violation where specific injuries from hostile discrimination were at issue. The Seattle Court, however, used the language from the Hunter concurrence to establish a new and far-reaching rationale. Seattle stated that where a government policy "inures primarily to the benefit of the minority" and "minorities . . . con- sider" the policy to be " 'in their interest,' " then any state action that "place[s] effective decisionmaking authority over" that policy "at a different level of government" must be reviewed under strict scrutiny. 458 U. S., at 472, 474. In essence, according to the broad reading of Seattle, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of Seattle that the Court of Appeals found to be controlling here. And that reading must be rejected.

The broad rationale that the Court of Appeals adopted goes beyond the necessary holding and the meaning of the precedents said to support it; and in the instant case neither the formulation of the general rule just set forth nor the precedents cited to authenticate it suffice to invalidate Proposal 2. The expansive reading of Seattle has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence. To the extent Seattle is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in Seattle; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or

controlling. The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live— think alike, share the same political interests, and will prefer the same candidates at the polls." Shaw v. Reno, 509 U. S. 630, 647 (1993); see also Metro Broadcasting, Inc. v. FCC, 497 U. S. 547, 636 (1990) (KENNEDY, J., dissenting) (rejecting the "demeaning notion that members of . . . defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"). It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the Seattle formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race- based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Cf. Ho v. San Francisco Unified School Dist., 147 F. 3d 854, 858 (CA9 1998) (school district delineating 13 racial categories for purposes of racial balancing). Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework, the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race. …

One response to these concerns may be that objections to the larger consequences of the Seattle formulation need not be confronted in this case, for here race was an undoubted subject of the ballot issue. But a number of problems raised by Seattle, such as racial definitions, still apply. And this principal flaw in the ruling of the Court of Appeals does remain: Here there was no infliction of a specific injury of the kind at issue in Mulkey and Hunter and in the history of the Seattle schools. Here there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended. …

By approving Proposal 2 and thereby adding §26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their

own times." Bond, 564 U. S., at —— (slip op., at 9). Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, Brown v. Board of Education, 347 U. S. 483 (1954); a wrongful invasion of the home, Silverman v. United States, 365 U. S. 505 (1961); or punishing a protester whose views offend others, Texas v. Johnson, 491 U. S. 397 (1989); and scores of other examples teach that individual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political ad- vantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of

the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

CHIEF JUSTICE ROBERTS, concurring.

The dissent states that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race." Post, at 46. And it urges that "[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" Ibid. But it is not "out of touch with reality" to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. Post, at 45. To disagree with the dissent's views on the costs and benefits of racial preferences is not to "wish away, rather than confront" racial inequality. Post, at 46. People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

… The dissent trots out the old saw, derived from dictum in a footnote, that legislation motivated by "'prejudice against discrete and insular minorities'" merits "'more exacting judicial scrutiny.'" Post, at 31 (quoting United States v. Carolene Products, 304 U. S. 144, 152–153, n. 4). I say derived from that dictum (expressed by the four- Justice majority of a seven-Justice Court) because the dictum itself merely said "[n]or need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition," id., at 153, n. 4 (emphasis added). The dissent does not argue, of course, that such "prejudice" produced §26. Nor does it explain why certain racial minorities in Michigan qualify as "'insular,'" meaning that "other groups will not form coalitions with them— and, critically, not because of lack of common interests but because of 'prejudice.'" Strauss, Is Carolene Products Obsolete? 2010 U. Ill. L. Rev. 1251, 1257. Nor does it even make the case that a group's "discreteness" and "insularity" are political liabilities rather than political strengths —a serious question that alone demonstrates the prudence of the Carolene Products dictumizers in leaving the "enquir[y]" for another day. As for the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . is to be subjected to more exacting judicial scrutiny," the Carolene Products Court found it "unnecessary to consider [that] now." 304 U. S., at 152, n. 4. If the dissent thinks that worth considering today, it should explain why the election of a university's governing board is a "political process which can ordinarily be expected to bring about repeal of undesirable legislation," but Michigan voters' ability to amend their Constitution is not. It seems to me quite the opposite. Amending the Constitution requires the approval of only "a majority of the electors voting on the question." Mich. Const., Art. XII, §2. By contrast, voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles. See BAMN v. Regents of Univ. of Mich., 701 F. 3d 466, 508 (CA6 2012) (Sutton, J., dissenting). So if Michigan voters, instead of amending their Constitution, had pursued the dissent's preferred path of electing board members promising to "abolish race-

sensitive admissions policies," post, at 3, it would have been harder, not easier, for racial minorities favoring affirmative action to overturn that decision. But the more important point is that we should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion.

JUSTICE BREYER, concurring in the judgment.

… I agree with the plurality that the amendment is consistent with the Federal Equal Protection Clause. But I believe this for different reasons. … I continue to believe that the Constitution permits, though it does not require, the use of the kind of race- conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided Grutter endure. …

The Constitution allows local, state, and national com- munities to adopt narrowly tailored race-conscious pro- grams designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs. Compare Parents Involved, 551 U. S., at 839 (BREYER, J., dissenting) (identifying studies showing the benefits of racially integrated education), with id., at 761–763 (THOMAS, J., concurring) (identifying studies suggesting racially integrated schools may not confer educational benefits). In short, the "Constitution creates a democratic political system through which the people themselves must together find answers" to disagreements of this kind. Id., at 862 (BREYER, J., dissenting).

[C]ases such as Hunter v. Erickson, 393 U. S. 385 (1969), and Washington v. Seattle School Dist. No. 1, 458 U. S. 457 (1982), reflect an important principle, namely, that an individual's ability to participate meaningfully in the political process should be independent of his race. Although racial minorities, like other political minorities, will not always succeed at the polls, they must have the same opportunity as others to secure through the ballot box policies that reflect their preferences. In my view, however, neither Hunter nor Seattle applies here. And the parties do not here suggest that the amendment violates the Equal Protection Clause if not under the Hunter- Seattle doctrine.

Hunter and Seattle involved efforts to manipulate the political process in a way not here at issue. Both cases involved a restructuring of the political process that changed the political level at which policies were enacted. In Hunter, decisionmaking was moved from the elected city council to the local electorate at large. 393 U. S., at 389–390. And in Seattle, decisionmaking by an elected school board was replaced with decisionmaking by the state legislature and electorate at large. 458 U. S., at 466.

This case, in contrast, does not involve a reordering of the political process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards, see Mich. Const., Art. VIII, §5, but those boards delegated admissions- related decisionmaking authority to unelected university faculty members and administrators [citations omitted]. Although the boards unquestionably retained the power to set policy regarding race-conscious admissions, (SOTOMAYOR, J., dissenting), in fact faculty members and administrators set the race-conscious admissions policies in question. … Thus, un- elected faculty members and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan's

constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Why does this matter? For one thing, considered conceptually, the doctrine set forth in Hunter and Seattle does not easily fit this case. In those cases minorities had participated in the political process and they had won. The majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future. The majority thereby diminished the minority's ability to participate meaningfully in the electoral process. But one cannot as easily characterize the movement of the decisionmaking mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority's ability to participate meaningfully in the political process. There is no prior electoral process in which the minority participated.

For another thing, to extend the holding of Hunter and Seattle to reach situations in which decisionmaking authority is moved from an administrative body to a political one would pose significant difficulties. The administrative process encompasses vast numbers of decisionmakers answering numerous policy questions in hosts of different fields. Administrative bodies modify programs in detail, and decisionmaking authority within the administrative process frequently moves around—due to amendments to statutes, new administrative rules, and evolving agency practice. It is thus particularly difficult in this context for judges to determine when a change in the locus of decisionmaking authority places a comparative structural burden on a racial minority. And to apply Hunter and Seattle to the administrative process would, by tending to hinder change, risk discouraging experimentation, interfering with efforts to see when and how race-conscious policies work.

Finally, the principle that underlies Hunter and Seattle runs up against a competing principle, discussed above. This competing principle favors decisionmaking through the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do.

As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an un- elected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate

meaningfully and equally in self- government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process.

This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities. …

In the wake of Grutter, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies. Those voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies. When this Court holds that the Constitution permits a particular policy, nothing prevents a majority of a State's voters from choosing not to adopt that policy. Our system of government encourages—and indeed, depends on—that type of democratic action.

But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities. They did so in the 2006 election by amending the Michigan Constitution to enact Art. I, §26, which provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

As a result of §26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area

of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else. This Court has held that the Fourteenth Amendment does not tolerate "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." Washington v. Seattle School Dist. No. 1, 458 U. S. 457, 467 (1982) (internal quotation marks omitted). Such restructuring, the Court explained, "is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others." Hunter v. Erickson, 393 U. S. 385, 391 (1969). In those cases—Hunter and Seattle—the Court recognized what is now known as the "political-process doctrine": When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.

Today, disregarding stare decisis, a majority of the Court effectively discards those precedents. The plurality does so, it tells us, because the freedom actually secured by the Constitution is the freedom of self-government— because the majority of Michigan citizens "exercised their privilege to enact laws as a basic exercise of their democratic power." It would be "demeaning to the democratic process," the plurality concludes, to disturb that decision in any way. This logic embraces majority rule without an important constitutional limit.

The plurality's decision fundamentally misunderstands the nature of the injustice worked by §26. This case is not, as the plurality imagines, about "who may resolve" the debate over the use of race in higher education admissions. Ante, at 18. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about how the debate over the use of race-sensitive admissions policies may be resolved - that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.

Like the plurality, I have faith that our citizenry will continue to learn from this Nation's regrettable history; that it will strive to move beyond those injustices towards a future of equality. And I, too, believe in the importance of public discourse on matters of public policy. But I part ways with the plurality when it suggests that judicial intervention in this case "impede[s]" rather than "advance[s]" the democratic process and the ultimate hope of equality. Ante, at 16. I firmly believe that our role as judges includes policing the

process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent. …

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its course.

The Fifteenth Amendment, ratified after the Civil War, promised to racial minorities the right to vote. But many States ignored this promise. In addition to outright tactics of fraud, intimidation, and violence, there are countless examples of States categorically denying to racial minorities access to the political process. Consider Texas; there, a 1923 statute prevented racial minorities from participating in primary elections. After this Court declared that statute unconstitutional, Nixon v. Herndon, 273 U. S. 536, 540–541 (1927), Texas responded by changing the rules. It enacted a new statute that gave political parties them- selves the right to determine who could participate in their primaries. Predictably, the Democratic Party specified that only white Democrats could participate in its primaries. Nixon v. Condon, 286 U. S. 73, 81–82 (1932). The Court invalidated that scheme, too.

Some States were less direct. Oklahoma was one of many that required all voters to pass a literacy test. But the test did not apply equally to all voters. Under a "grandfather clause," voters were exempt if their grandfathers had been voters or had served as soldiers before 1866. This meant, of course, that black voters had to pass the test, but many white voters did not. The Court held the scheme unconstitutional. Guinn v. United States, 238 U. S. 347 (1915). In response, Oklahoma changed the rules. It enacted a new statute under which all voters who were qualified to vote in 1914 (under the unconstitutional grandfather clause) remained qualified, and the remaining voters had to apply for registration within a 12-day period. Lane v. Wilson, 307 U. S. 268, 270–271 (1939). The Court struck down that statute as well. Id., at 275.

Racial minorities were occasionally able to surmount the hurdles to their political participation. Indeed, in some States, minority citizens were even able to win elective office. But just as many States responded to the Fifteenth Amendment by subverting minorities' access to the polls, many States responded to the prospect of elected minority officials by undermining the ability of minorities to win and hold elective office. Some States blatantly removed black officials from local offices. See, e.g., H. Rabinowitz, Race Relations in the Urban South, 1865–1890, pp. 267, 269–270 (1978) (describing events in Tennessee and Virginia). Others changed the processes by which local officials were elected. See, e.g., Extension of the Voting Rights Act, Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., pt. 1, pp. 2016–2017 (1981) (hereinafter 1981 Hearings) (statement of Professor J. Morgan Kousser) (after a black judge refused to resign in Alabama, the legislature abolished the court on which he served and replaced it with one whose judges were appointed by the Governor); Rabinowitz, supra, at 269– 270 (the North Carolina Legislature divested voters of the right to elect justices of the peace and county commissioners, then arrogated to itself the authority to select justices of the peace and gave them the power to select commissioners).

This Court did not stand idly by. In Alabama, for example, the legislature responded to increased black voter registration in the city of Tuskegee by amending the State Constitution to authorize legislative abolition of the county in which Tuskegee was located and by redrawing the city's boundaries to remove all the black voters "while not removing a single white voter," Gomillion v. Lightfoot, 364 U. S. 339, 341 (1960). The Court intervened, finding it "inconceivable that guaranties embedded in the Constitution" could be "manipulated out of existence" by being "cloaked in the garb of [political] realignment." Id., at 345 (internal quotation marks omitted). This Court's landmark ruling in Brown v. Board of Education, 347 U. S. 483 (1954), triggered a new era of political restructuring, this time in the context of education. In Virginia, the General Assembly transferred control of student assignment from local school districts to a State Pupil Placement Board. And when the legislature learned that the Arlington County school board had prepared a desegregation plan, the General Assembly "swiftly retaliated" by stripping the county of its right to elect its school board by popular vote and instead making the board an appointed body. Id., at 24; see also B. Smith, They Closed Their Schools 142–143 (1965). Other States similarly disregarded this Court's mandate by changing their political process. [Citations omitted].

The Court remained true to its command in Brown. In Arkansas, for example, it enforced a desegregation order against the Little Rock school board. Cooper v. Aaron, 358 U. S. 1, 5 (1958). On the very day the Court announced that ruling, the Arkansas Legislature responded by changing the rules. It enacted a law permitting the Governor to close any public school in the State, and stripping local school districts of their decisionmaking authority so long as the Governor determined that local officials could not maintain "'a general, suitable, and efficient educational system.' " Aaron v. Cooper, 261 F. 2d 97, 99 (CA8 1958) (per curiam) (quoting Arkansas statute). The then-Governor immediately closed all of Little Rock's high schools. Id., at 99–100.

The States' political restructuring efforts in the 1960's and 1970's went beyond the context of education. Many States tried to suppress the political voice of racial minorities more generally by reconfiguring the manner in which they filled vacancies in local offices, often transferring authority from the electorate (where minority citizens had a voice at the local level) to the States' executive branch (where minorities wielded little if any influence). See, e.g., 1981 Hearings, pt. 1, at 815 (report of J. Cox & A. Turner) (the Alabama Legislature changed all municipal judge- ships from elective to appointive offices); id., at 1955 (report of R. Hudlin & K. Brimah, Voter Educ. Project, Inc.) (the Georgia Legislature eliminated some elective offices and made others appointive when it appeared that a minority candidate would be victorious); id., at 501 (statement of Frank R. Parker, Director, Lawyers' Comm. for Civil Rights Under Law) (the Mississippi Legislature changed the manner of filling vacancies for various public offices from election to appointment).

It was in this historical context that the Court intervened in Hunter v. Erickson, 393 U. S. 385 (1969), and Washington v. Seattle School Dist. No. 1, 458 U. S. 457 (1982). Together, Hunter and Seattle recognized a fundamental strand of this Court's equal protection jurisprudence: the political-process doctrine.

In Hunter, the City Council of Akron, Ohio, enacted a fair housing ordinance to "assure equal opportunity to all persons to live in decent housing facilities regardless of

race, color, religion, ancestry, or national origin." 393 U. S., at 386 (internal quotation marks omitted). A majority of the citizens of Akron disagreed with the ordinance and overturned it. But the majority did not stop there; it also amended the city charter to prevent the City Council from implementing any future ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the Akron electorate. Ibid. That amendment changed the rules of the political process in Akron. The Court described the result of the change as follows:

"[T]o enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council and of a major- ity of the voters citywide. To enact an ordinance pre- venting housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council." Seattle, 458 U. S., at 468 (describing Hunter; emphasis deleted).

The Court invalidated the Akron charter amendment under the Equal Protection Clause. It concluded that the amendment unjustifiably "place[d] special burdens on racial minorities within the governmental process," thus effecting "a real, substantial, and invidious denial of the equal protection of the laws." Hunter, 393 U. S., at 391, 393. The Court characterized the amendment as "no more permissible" than denying racial minorities the right to vote on an equal basis with the majority. Id. at 391. For a "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." Id., at 392–393. The vehicle for the change—a popular referendum—did not move the Court: "The sovereignty of the people," it explained, "is itself subject to . . . constitutional limitations." Id., at 392.

In Seattle, a case that mirrors the one before us, the Court applied Hunter to invalidate a statute, enacted by a majority of Washington State's citizens, that prohibited racially integrative busing in the wake of Brown. As early as 1963, Seattle's School District No. 1 began taking steps to cure the de facto racial segregation in its schools. Among other measures, it enacted a desegregation plan that made extensive use of busing and mandatory assignments. The district was under no obligation to adopt the plan; Brown charged school boards with a duty to integrate schools that were segregated because of de jure racial discrimination, but there had been no finding that the de facto segregation in Seattle's schools was the product of de jure discrimination. Several residents who opposed the desegregation efforts formed a committee and sued to enjoin implementation of the plan. When these efforts failed, the committee sought to change the rules of the political process. It drafted a statewide initiative "designed to terminate the use of mandatory busing for purposes of racial integration." Id., at 462. A major- ity of the State's citizens approved the initiative. Id., at 463–464.

The Court invalidated the initiative under the Equal Protection Clause. It began by observing that equal protection of the laws "guarantees racial minorities the right to full participation in the political life of the community." Id., at 467. "It is beyond dispute," the Court explained, "that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner." Ibid. But the Equal Protection Clause reaches further, the Court stated, reaffirming the principle espoused in Hunter—that while "laws structuring political institutions or

allocating political power according to neutral principles" do not violate the Constitution, "a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." 458 U. S., at 470. That kind of state action, it observed, "places special bur- dens on racial minorities within the governmental process," by making it "more difficult for certain racial and religious minorities" than for other members of the com- munity "to achieve legislation . . . in their interest." Ibid. …

The Court next concluded that "the practical effect of [the initiative was] to work a reallocation of power of the kind condemned in Hunter." Seattle, 458 U. S., at 474. It explained: "Those favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board." Ibid. Thus, the initiative required those in favor of racial integration in public schools to "surmount a considerably higher hurdle than persons seeking comparable legislative action" in different contexts. Ibid.

The Court reaffirmed that the "'simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.'" Id. at 483. But because the initiative burdened future attempts to integrate by lodging the decisionmaking authority at a "new and remote level of government," it was more than a "mere repeal"; it was an unconstitutionally discriminatory change to the political process.

Hunter and Seattle vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority's right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority," Seattle, 458 U. S., at 472; and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process. A faithful application of the doc- trine resoundingly resolves this case in respondents' favor. …

Petitioner argues that race-sensitive admissions policies cannot "inur[e] primarily to the benefit of the minority," ibid., as the Court has upheld such policies only insofar as they further "the educational benefits that flow from a diverse student body," Grutter, 539 U. S., at 343. But there is no conflict between this Court's pronouncement in Grutter and the common-sense reality that race-sensitive admissions policies benefit minorities. Rather, race- sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two. Cf. Seattle, 458 U. S., at 472 (concluding that the desegregation plan had a racial focus even though "white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom' "). …

The effect of §26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.

Such reordering of the political process contravenes Hunter and Seattle. Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. Michigan does not assert that §26 satisfies a compelling state interest. That should settle the matter.

The plurality sees it differently. Disregarding the language used in Hunter, the plurality asks us to contort that case into one that "rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities." And the plurality recasts Seattle "as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." According to the plurality, the Hunter and Seattle Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose to discriminate. This is not a tenable reading of those cases.

The plurality identifies "invidious discrimination" as the "necessary result" of the restructuring in Hunter. It is impossible to assess whether the housing amendment in Hunter was motivated by discriminatory purpose, for the opinion does not discuss the question of intent. What is obvious, however, is that the possibility of invidious discrimination played no role in the Court's reasoning. We ordinarily understand our precedents to mean what they actually say, not what we later think they could or should have said. The Hunter Court was clear about why it invalidated the Akron charter amendment: It was impermissible as a restructuring of the political process, not as an action motivated by discriminatory intent. See 393 U. S., at 391 (striking down the Akron charter amendment because it "places a special burden on racial minorities within the governmental process").

Similarly, the plurality disregards what Seattle actually says and instead opines that "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." Ante, at 17. Here, the plurality derives its conclusion not from Seattle itself, but from evidence unearthed more than a quarter-century later in Parents Involved. It is nothing short of baffling, then, for the plurality to insist—in the face of clear language in Hunter and Seattle saying otherwise—that those cases were about nothing more than the intentional and invidious infliction of a racial injury. The plurality's attempt to rewrite Hunter and Seattle so as to cast aside the political-process doctrine sub silentio is impermissible as a matter of stare decisis. Under the doctrine of stare decisis, we usually stand by our decisions, even if we disagree with them, because people rely on what we say, and they believe they can take us at our word.

And what now of the political-process doctrine? After the plurality's revision of Hunter and Seattle, it is unclear what is left. The plurality certainly does not tell us. On

this point, and this point only, I agree with JUSTICE SCALIA that the plurality has rewritten those precedents beyond recognition. …

Two more recent cases involving discriminatory restructurings of the political process are also worthy of mention: Romer v. Evans, 517 U. S. 620 (1996), and League of United Latin American Citizens v. Perry, 548 U. S. 399 (2006) (LULAC).

Romer involved a Colorado constitutional amendment that removed from the local political process an issue primarily affecting gay and lesbian citizens. The amendment, enacted in response to a number of local ordinances prohibiting discrimination against gay citizens, repealed these ordinances and effectively prohibited the adoption of similar ordinances in the future without another amendment to the State Constitution. 517 U. S., at 623–624. Although the Court did not apply the political process- doctrine in Romer, the case resonates with the principles undergirding the political-process doctrine. The Court rejected an attempt by the majority to transfer decision- making authority from localities (where the targeted minority group could influence the process) to state government (where it had less ability to participate effectively). See id., at 632 (describing this type of political restructuring as a "disability" on the minority group). Rather than being able to appeal to municipalities for policy changes, the Court commented, the minority was forced to "enlis[t] the citizenry of Colorado to amend the State Constitution," id., at 631—just as in this case.

LULAC, a Voting Rights Act case, involved an enactment by the Texas Legislature that redrew district lines for a number of Texas seats in the House of Representatives. In striking down the enactment, the Court acknowledged the "'long, well-documented history of discrimination'" in Texas that " 'touched upon the rights of . . . Hispanics to register, to vote, or to participate otherwise in the electoral process,'" id., at 439, and it observed that that the "'political, social, and economic legacy of past discrimination' . . . may well [have] 'hinder[ed] their ability to participate effectively in the political process,'" id., at 440. Against this backdrop, the Court found that just as "Latino voters were poised to elect their candidate of choice," id., at 438, the State's enactment "took away [their] opportunity because [they] were about to exercise it," id., at 440. The Court refused to sustain "the resulting vote dilution of a group that was beginning to achieve [the] goal of overcoming prior electoral discrimination."

As in Romer, the LULAC Court—while using a different analytic framework—applied the core teaching of Hunter and Seattle: The political process cannot be restructured in a manner that makes it more difficult for a traditionally excluded group to work through the existing process to seek beneficial policies. And the events giving rise to LULAC are strikingly similar to those here. Just as redistricting prevented Latinos in Texas from attaining a benefit they had fought for and were poised to enjoy, §26 prevents racial minorities in Michigan from enjoying a last-resort benefit that they, too, had fought for through the existing political processes. …

JUSTICE SCALIA wonders whether judges are equipped to weigh in on what constitutes a "racial issue." See ante, at 8. The plurality, too, thinks courts would be "with no clear legal standards or accepted sources to guide judicial decision." …et as JUSTICE SCALIA recognizes, Hunter and Seattle provide a standard: Does the public policy at issue "inur[e] primarily to the benefit of the minority, and [was it] de- signed for that

purpose"? Seattle, 458 U. S., at 472. Surely this is the kind of factual inquiry that judges are capable of making. JUSTICE SCALIA, for in- stance, accepts the standard announced in Washington v. Davis, which requires judges to determine whether discrimination is intentional or whether it merely has a discriminatory effect. Such an inquiry is at least as difficult for judges as the one called for by Hunter and Seattle. In any event, it is clear that the constitutional amendment in this case has a racial focus; it is facially race-based and, by operation of law, disadvantages only minorities.

"No good can come" from these inquiries, JUSTICE SCALIA responds, because they divide the Nation along racial lines and perpetuate racial stereotypes. The plurality shares that view; it tells us that we must not assume all individuals of the same race think alike. The same could have been said about desegregation: Not all members of a racial minority in Seattle necessarily regarded the integration of public schools as good policy. Yet the Seattle Court had little difficulty saying that school integration as a general matter "inure[d] . . . to the benefit of " the minority. 458 U. S., at 472.

My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out. We have seen this reasoning before. See Parents Involved, 551 U. S., at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"). It is a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as "not sufficient" to resolve cases of this nature. While "[t]he enduring hope is that race should not matter[,] the reality is that too often it does." Id., at 787. "[R]acial discrimination . . . [is] not ancient history." Bartlett v. Strickland, 556 U. S. 1, 25 (2009) (plurality opinion).

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. See Part I, supra; see also South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (describing racial discrimination in voting as "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"). And although we have made great strides, "voting discrimination still exists; no one doubts that." Shelby County, 570 U. S., at __ (slip op., at 2).

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. See Gratz, 539 U. S., at 298–300 (GINSBURG, J., dissenting) (cataloging the many ways in which "the effects of centuries of law- sanctioned inequality remain painfully evident in our communities and schools," in areas like employment, poverty, access to health care, housing, consumer transactions, and education); Adarand, 515 U.S., at 273 (GINSBURG, J., dissenting) (recognizing that the "lingering effects" of discrimination, "reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods").

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race

matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.

The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason. …

Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

I respectfully dissent.

Review Questions and Explanations: *Schuette*

1. After the Court's decisions in *Grutter* and *Gratz*, the people of Michigan adopted by referendum a state constitutional ban on the consideration in any way of race in state university admissions. *Schuette* is a challenge to that state constitutional ban. As such, it presents a different type of Equal Protection clause than those we have studied so far. While reading the case, take care to carefully articulate the claim in the words of equal protection: what is the classification by the law, and for what reason?

2. The justices often make assertions, in Affirmative Action and other types of cases, about the effect of such laws on students, teachers, and society. These assertions are only rarely backed up by empirical evidence, even though they often take the form of presumed facts rather than opinions. Justice Sotomayor's dissent in *Schuette* sharply raises the question of perspective in relation to such assertions: what "we" think the message sent by a law or a policy is probably depends a great deal on where we stand and who we are listening to. One of the values of having a diverse court is to help us remember that our own perspective of how things work, or what things "obviously" mean is just that –a perspective. Given that the Court often works in the murky space between fact and opinion – applying doctrines built on concepts like "reasonableness" and "compelling" – what effect should insights about competing perspectives have on legal

reasoning? It may be helpful to think about this question in regard to the historical context Justice Sotomayor includes toward the end of her opinion.

3. Justice Sotomayor's dissent also includes 15 pages of actual empirical data, not reprinted here, showing a sharp decline in racial diversity at universities in states that have adopted policies similar to Michigan's. Is this a legally relevant fact?

4. The majority and dissent disagree about the role that courts should play in protecting minority groups from majority power. Justice Scalia, his separate opinion, takes this agreement even further, questioning the famous footnote 4 in *Caroline Products*. What do you think of his argument?

* * * *

E. Not-Quite-Suspect Classifications

[For inclusion following *Romer v. Evans* and *Lawrence v. Texas*, p. 922.]

Guided Reading Questions: *United States v. Windsor*

1. DOMA has two principal parts, only one of which is at issue in the case. Try to identify those two aspects of the Defense of Marriage Act (DOMA), and explain why the one is not an issue and the other is.

2. Identify the structure of the constitutional problem presented by DOMA. The Court considers both equal protection and due process challenges:

a. Equal protection: (1) what is the legislative distinction or classification being drawn; (2) what does the regulation require or prohibit; (3) what is the governmental objective or interest in imposing the requirement or prohibition on the regulated class; and (4) how strong is the connection -- the fit -- between the regulation of the class (1 and 2) and the governmental objective (3)?

b. Due process: (1) what is the claimed right that is restricted by the regulation? (2) what is the governmental objective or interest in imposing the regulation; and (3) how strong is the connection -- the fit -- between the restriction of the right (1) and the governmental objective (2)?

3. What are the arguments for applying heightened scrutiny in this case? Consider both equal protection and due process. Are the arguments for heightened scrutiny the same or different, and if different, how? Does the majority apply heightened scrutiny or rational basis? Or is it simply too unclear to tell?

4. Why do you think the majority emphasizes the vast scope of DOMA – i.e., that it affects the rights and benefits of same-sex couples under a huge number of federal laws and programs?

United States v. Windsor

570 U.S. __, 133 S. Ct. 2675 (2013)

Majority: ***Kennedy***, Ginsburg, Breyer, Sotomayor, Kagan

Dissent: ***Roberts*** (CJ), ***Scalia***, Thomas, ***Alito***

Justice KENNEDY delivered the opinion of the Court.

…. In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U.S.C. § 1738C.

Section 3 is at issue here. It …. provides as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U.S.C. § 2056(a). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. Noting that "the Department has previously defended DOMA against ... challenges involving legally married same-sex couples," the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President ... instructed the Department not to defend the statute in Windsor," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised."

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA…. The District Court … grant[ed] intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

[The Court decided that the United States had standing to pursue the appeal even though it agreed with Windsor's constitutional arguments, because it was continuing to enforce DOMA by withholding the tax refund.]

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had

not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. Hillman v. Maretta, 133 S.Ct. 1943 (2013. This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and

proper for state-law purposes.. And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975).

…. The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations…. [We have held that] "there is no federal law of domestic relations." In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction….

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Romer v. Evans, 517 U.S. 620, 633 (1996).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address

whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." Bond v. United States, 131 S.Ct. 2355, 2359 (2011). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." Lawrence v. Texas, 539 U.S. 558, 567, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical *2693 roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; Bolling v. Sharpe, 347 U.S. 497 (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motived by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a

disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H.R.Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality." Id., at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Ibid. Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married…. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral

and sexual choices the Constitution protects, see Lawrence, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries.

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] ... a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U.S.C. § 115(a)(1)(A), with the intent to influence or retaliate against that official, § 115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate family," § 115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security….

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See Bolling, 347 U.S., at 499–500. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By

seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages. The judgment of the Court of Appeals for the Second Circuit is affirmed.

CHIEF JUSTICE ROBERTS, dissenting.

I agree with Justice SCALIA …. that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." Ante, at 2689. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose," of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage….

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case….

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting. [Note: Roberts, CJ, joined Justice Scalia's argument on jurisdiction, but did not joint the portion reproduced here.]

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

[Justice Scalia argued that the United States lacked standing to appeal, so that the case before the appellate court and the Supreme Court should have been dismissed.]

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of "the usual tradition of recognizing and accepting state definitions of marriage" continue. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

…. [I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below. In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See United States v. Virginia, 518 U.S. 515, 567–570, (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases …. But the Court certainly does not apply anything that resembles that deferential framework..

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," ante, at 2695; that it violates "basic due process" principles, ante, at 2693; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment." The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "ordered liberty." Id., at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare ... desire to harm" couples in same-sex marriages. It is this proposition with which I will therefore engage.

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See Lawrence v. Texas, 539 U.S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. 367 (1968). Or at least it was a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare ... desire to harm a politically unpopular group." Ante, at 2693. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing

from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See ante, at 2693. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as they see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." Ala.Code § 30–1–19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, which State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only opposite-sex spouses—those being the only sort that were recognized in any State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with malice—with the "purpose" "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean,"; to "impose inequality,"; to "impose ... a stigma,"; to deny people "equal dignity," ibid.; to brand gay people as "unworthy," ante, at 2694; and to "humiliat[e" their children, ibid. (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with the purpose to "disparage," "injure,"

"degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it hostes humani generis, enemies of the human race.

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." I have heard such "bald, unreasoned disclaimer[s]" before. Lawrence, 539 U.S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Id., at 578. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects,"—with an accompanying citation of Lawrence. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE's view that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could theoretically do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare ... desire to harm" couples in same-sex marriages.. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. … As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over

marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule ourselves. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012),6 are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012). Even in a single State, the question has come out differently on different occasions.

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

[Justice Alito argued that the United States lacked standing to pursue the appeal, but on grounds different from those of Justice Scalia.]

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," suggests that substantive due process may partially underlie the Court's decision today. But it is well established

that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition," Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997)…. It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition….

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

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…

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…. Any change on a question so fundamental should be made by the people through their elected officials.

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms…. In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex….

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue

that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

…. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down § 3 of DOMA as a classification not properly supported by its objectives….

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today's opinion of the Court will soon be scattered to the wind.

In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by § 3, Congress has the power to define the category of persons to whom those laws apply.

Review Questions and Explanations: *United States v. Windsor*

1. What is the majority rationale in the case? Put another way, what constitutional principle is violated by DOMA – equal protection, due process, federalism, or some combination of the three?

2. Consider the *Romer* case. Could *Windsor* have been decided simply on the basis of *Romer*? Was it?

3. Was the federalism discussion necessary or even important to the result? Could *Windsor* have been decided strictly on federalism grounds? In answering this question, reconsider Guided Reading Question #4.

4. Obviously, the dissenters all discussed the merits. (Indeed, Justice Alito presented his views on the merits of the *Hollingsworth* case, on whether *state* same-sex marriage bans are constitutional!) Suppose Justice Kennedy believed DOMA was constitutional. Do you think the four dissenters in that event would have set aside their qualms about standing and formed a five-justice majority to uphold DOMA?

5. The dissenters argued that the case should have been dismissed on the ground that the United States had no standing to pursue the appeal, and that the majority should not have reached the merits. They nevertheless signal their views on the merits – i.e., that DOMA is constitutional. Is doing so proper in light of their claim that the judiciary is without power to adjudicate the merits?

6. The dissenters say that the majority opinion does not mean that same-sex marriage bans by states are unconstitutional. Are they correct? Note that there are two approaches to the question: one is to ask whether the precise holding of the case applies to state-law same-sex marriage bans; the other would consider whether the underlying "spirit" or direction of the majority opinion presages at least five votes to strike down the same sex marriage ban.

This very issue was before the court in a companion case, *Hollingsworth v. Perry*. There, a lesbian couple challenged a California constitutional amendment (known as "Proposition 8" after the ballot initiative that amended the constitution) which prohibited the state from recognizing same-sex marriages. The district court struck down the ban, holding that the Fourteenth Amendment due process and Equal Protection clauses prohibited states from denying homosexual couples the right to marry. The state declined to further defend the law, and decided not to appeal; instead an appeal was taken by a citizen group of supporters of Proposition 8. The Ninth Circuit affirmed, but on the much narrower ground that Proposition 8 violated the Fourteenth Amendment by stripping homosexual couples of a pre-existing right to marry. (Same sex marriage had been recognized in California for several months between the time that a state supreme court decision recognizing same sex-marriage and effective date of Proposition 8, which amended the state constitution in effect to overrule that decision.) The U.S. Supreme Court dismissed the appeal, on the ground that the citizen group lacked standing to appeal the district court's decision. The result of the dismissal is that the district court decision stands, and same-sex marriage is now recognized in California. Note that the district court decision covered only California and is not a binding precedent elsewhere.

Guided Reading Questions: *Obergefell v. Hodges*

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1. What are the questions presented for review in this case?

2. Consider the possible doctrinal approaches to the first question presented: equal protection or fundamental rights.

   (a) How do you characterize the alleged rights violation of a same-sex marriage ban to frame the question as one of equal protection? How do you characterize the rights violation to frame the question as one of fundamental rights? How does the court approach the question?

   (b) Both equal protection and fundamental rights approaches can be further analyzed under rational basis or heightened (either intermediate or strict) scrutiny tests. The result of two doctrines each bearing two levels of scrutiny creates a matrix of four doctrinal approaches. Does the Court clearly choose any of these? Which one(s)?

3. Consider the majority's historical background of marriage. Aside from rhetorical and atmospheric support for the conclusion, what doctrinal point(s) does this discussion help to set up?

4. How do the majority and dissenting opinions differ in the way they categorize the right at stake?

5. How do the majority and dissenting opinions differ on the significance of history in the constitutional analysis?

Obergefell v. Hodges

135 S. Ct. 2584 (2015)

Majority: ***Kennedy***, Ginsburg, Breyer, Sotomayor, and Kagan,

Dissents: ***Roberts (CJ), Scalia, Thomas, Alito*** (omitted)

JUSTICE KENNEDY delivered the opinion of the Court.

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

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor.. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. DeBoer v. Snyder, 772 F.3d 388 (2014). 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.

…. This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by

the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

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. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). 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." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was

diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. 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.[2] As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

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

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. 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, 478 U.S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in Romer v. Evans, 517 U.S. 620 (1996), the Court invalidated an amendment to Colorado's

[2] **Editors' note:** The doctrine of coverture terminated various independent personal rights of a woman upon marriage. The right to sue, to own property, to make a will, and others were deemed subsumed into the rights of the husband.

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, 539 U.S. 558, 575 (2003).

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). 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), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

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, 798 N.E.2d 941 (Mass. 2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes…. Two Terms ago, in United States v. Windsor,133 S.Ct. 2675, 186 L.Ed.2d 808 (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, see Citizens for Equal Protection v. Bruning, 455 F.3d 859, 864–868 (8th Cir. 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, 391 U.S. 145, 147–149 (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, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–486, (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See ibid. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence, supra, at 572. 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, 388 U.S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in Zablocki v. Redhail, 434 U.S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley, 482 U.S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–640 (1974); Griswold, supra, at 486; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, 409 U.S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. And in assessing whether the force

and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki, supra, at 386.

Choices about marriage shape an individual's destiny…. The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. 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." Id., at 486…. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." Windsor, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Lawrence invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer, 262 U.S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." Zablocki, 434 U.S., at 384. Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S.Ct., at 2694–2695. 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…. In Maynard v. Hill, 125 U.S. 190 (1888), the Court echoed de Tocqueville, explaining that marriage …. 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.

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. 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, 521 U.S. 702, 721 (1997)…. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. 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 [v. Virginia] 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…. 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. "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." 388 U.S., at 12, 87 S.Ct. 1817. 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 synergy between the two protections is illustrated further in Zablocki. There the ….equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." …

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…. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage….

Other cases confirm this relation between liberty and equality…. In Lawrence the Court …. 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.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. …

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…. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking….

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…. 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, 319 U.S. 624 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." Ibid. 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. See 478 U.S., at 186, 190–195, 106 S.Ct. 2841. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the Bowers Court. That is why Lawrence held Bowers was "not correct when it was decided." 539 U.S., at 578. 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….

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

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

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

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

…. Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." Id., at 69, 25 S.Ct. 539 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." I have no choice but to dissent.

I

…. There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—who decides what constitutes "marriage"? …

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….

This singular understanding of marriage has prevailed in the United States throughout our history…. 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." Windsor, 133 S.Ct., at 2691. There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.... This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning.…

As the majority notes, some aspects of marriage have changed over time…. [These changes] did not, however, work any transformation in the core structure of marriage as the union between a man and a woman….

…. Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

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

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners,

expressly disowned that position before this Court. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause….

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an enumerated constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. They argue instead that the laws violate a right implied by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." Reno v. Flores, 507 U.S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in Dred Scott v. Sandford, 19 How. 393 (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." Id., at 450. 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." Id., at 621.

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.” 198 U.S., at 60, 61. 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.” Id., at 58.

The dissenting Justices in Lochner explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least “room for debate and for an honest difference of opinion.” Id., at 72 (opinion of Harlan, J.). The majority’s contrary conclusion required adopting as constitutional law “an economic theory which a large part of the country does not entertain.” Id., at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” a leading work on the philosophy of Social Darwinism. The Constitution “is not intended to embody a particular economic theory.... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.” Id., at 75–76.

In the decades after Lochner, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that “[t]he criterion of constitutionality is not whether we believe the law to be for the public good.” Adkins v. Children’s Hospital of D.C., 261 U.S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected “liberty,” the Lochner line of cases left “no alternative to regarding the court as a ... legislative chamber.” L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. “The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,” we later explained, “has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony with a particular school of thought.” Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

Rejecting Lochner does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating Lochner ‘s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for “judicial self-restraint.” Our precedents have required that implied fundamental rights be “objectively, deeply rooted in this Nation’s

history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S., at 720–721.

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in Glucksberg, many other cases both before and after have adopted the same approach.

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few "guideposts for responsible decisionmaking in this unchartered area… an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula." Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of Lochner.

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In Loving, the Court held that racial restrictions on the right to marry lacked a compelling justification. In Zablocki, restrictions based on child support debts did not suffice. In Turner, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in Zablocki and Turner did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in Loving define marriage as "the union of a man and a woman of the same race."

Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was….

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….

The majority suggests that "there are other, more instructive precedents" informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy."…

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….

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in Glucksberg. It is revealing that the majority's position requires it to effectively overrule Glucksberg, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: Lochner v. New York. The majority opens its opinion by announcing petitioners' right to "define and express their identity." The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be free in his person and in his power to contract in relation to his own labor." Lochner, 198 U.S., at 58.

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." …

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. Brown v. Buhman, 947 F.Supp.2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). 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….

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 …. fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position…. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." Lawrence, 539 U.S., at 585, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom ... apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" amicus briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era."

…. 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….

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving ..., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." [Ruth Bader] Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution….

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…. 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…. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition…. 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. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

The Constitution places some constraints on self-rule—constraints adopted by the People themselves when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," denying "Full Faith and Credit" to the "public Acts" of other States, prohibiting the free exercise of religion, abridging the freedom of speech, infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove that issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today): "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." [United States v. Windsor]….

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the

People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect. That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions...." One would think that sentence would continue: "... and therefore they provided for a means by which the People could amend the Constitution," or perhaps "... and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." The "we," needless to say, is the nine of us….

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; they say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

FN 18. The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as Amicus Curiae in Nos. 14–571 and 14–574, pp. 1–5.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment."…

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.

> **FN 22.** 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.

Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and

precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis….

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….

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

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

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

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

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

will have inestimable consequences for our Constitution and our society. I respectfully dissent.

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

…. 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….

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. 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. 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….

Review Questions and Explanations: *Obergefell v. Hodges*

1. The majority says that the various court of appeals decisions, both those striking and those upholding same sex marriage bans, were issued "[i]n accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary." What do you think that was about?

2. Reconsider GRQ #2. What approach did the majority take to equal protection, due process and the levels of scrutiny? Clearly missing was the analysis relied on by Justice Kennedy in his opinion in *Romer v. Evans*. There, the Court struck down a Colorado constitutional amendment banning anti-discrimination statutes and ordinances specifically protecting gays and lesbians. The *Romer* opinion held that the law failed the rational basis test for equal protection, because it was enacted for the impermissible purpose of expressing mere moral disapproval of a group. Could the Court have adopted that approach here? If not, why not? If so, why do you think it declined to do so?

The dissents attack the majority's approach to equal protection as incoherent. Although not cited in the majority opinion, there is a line of cases described as "the fundamental rights strand of equal protection." (See chapter 8, section F of the casebook.) Is that category analytically useful for understanding *Obergefell*?

3. What views of personhood are implicit in the majority and dissenting opinions? In his *Romer* dissent, Justice Scalia likened gays and lesbians to persons engaging simply in conduct that the state could regulate as immoral, like (in his example) gambling. Is that simply Scalia's opinion, or is it an unstated premise of all of the dissents? Consider whether the real issue in this case is a right to be recognized as a person, with the same rights as other people, rather than to be classified as a person who engages in regulable conduct, like gambling or driving the speed limit. If that is the analysis, perhaps this should have been analyzed as an equal protection rather than a fundamental rights case?

4. Chief Justice Roberts' dissent makes an extended argument for judicial restraint, One premise of his argument is that finding fundamental rights in the due process clause is more likely to implement the judges own preferences to the detriment of democratic processes than in constitutional cases based on clauses identifying specific rights, like the First Amendment. Do you agree? Is there a definiteness in the First Amendment's free speech clause that imposes judicial restraint?

5. The dissenters can't disapprove Loving v. Virgnia and maintain any credibility; therefore they have to distinguish it. Chief Justice Roberts argues, in essence, that fundamental rights cannot be based on novel social ideas, only deeply rooted, traditional ones. He suggests that *Loving* fits this mold, because barring race discrimination in marriage did not overturn any aspect of the essential definition of marriage. Therefore, it added nothing novel to the fundamental right of marriage.

Is it historically accurate to say that exclusion of unwanted groups has never been a "traditional" part of the definition of marriage? There have been norms, customs and laws around the world, and throughout history, disapproving marriage outside of a given religion, ethnic group, social caste or race. The idea of marriage *without* such restrictions is thus something of a novelty in recorded history.

Chief Justice Roberts' discussion of the history of racial intermarriage in the U.S. in particular is historically inaccurate. Slaves were barred from marrying, and the Thirteenth Amendment did not automatically confer this right on newly freed slaves, whose legal rights of all types were left in limbo by the Amendment. The nature and extent of these rights were heavily debated during Reconstruction as freed slaves were granted various rights piecemeal. Anti-miscegenation laws (banning interracial marriage), which had existed in some northern states before the Civil War, were enacted throughout the South in the post-Reconstruction period as states grappled with the question of whether "political equality" of freed blacks also conferred "social equality." These, along with Jim Crow laws, were enacted to confirm the supposed, pre-existing right of whites to prevent the social and (what was viewed by many as worse) genetic mingling of the races. Many historians now agree that these views commanded majority support among whites when the Fourteenth Amendment was framed and for many decades afterwards. So when Loving v. Virginia was decided in 1967, interracial marriage was a novelty with a long history of social disapproval.

Suppose, contrary to Roberts' assertion, the Virginia law in the Loving case had in fact defined marriage as a union of "a man and a woman of the same race." Is he suggesting that the outcome of the Loving case would (or should) have been different in that event?

6. Is the equal protection clause less subject to judicial activism than the due process clause? Some respected legal commentators in the 1950s, even political liberals, criticized *Brown v. Board of Education* as unwarranted judicial activism, implying that the ongoing political debate on school segregation and Jim Crow laws should have been allowed to continue to play out in the political process. See, most famously, Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 74 Harv. L. Rev. 1, 31-34 (1959). Were the critics right?

Are there arguments in Chief Justice Roberts' dissent that could not have been employed in a (hypothetical) dissent from *Brown*? Modern legal historians largely agree that the majority of framers and ratifiers of the Fourteenth Amendment did not believe that the amendment required desegregation of public places (e.g., schools, public transportation, workplaces, businesses serving the public) or state recognition of racial intermarriage.

7. Arguably, the Scalia dissent does not add anything substantive to the Roberts dissent. We include it because its tone is noteworthy. Do you think the tone is suitable for a judicial opinion for someone with life tenure on the nation's highest court? As for its substance, you've read (or will read) many cases in this book in which Justice Scalia voted to strike down a federal or state law (whether as a member of the majority or in dissent). We haven't counted recently, but we have no reason to believe that Justice Scalia votes to do so in significantly fewer cases than any of his colleagues. (Between

1994 and 2004, all nine justices voted to strike down federal or state laws between 58 and 66 times. See charts at pp. 604-05 of the casebook.) Is his appeal to judicial restraint and the democratic process here consistent with those other cases? Perhaps it is—if so, what is the principled distinction? (The same question can be raised about the Roberts dissent.)

C. Content-Based and Content-Neutral Regulation

* * *

3. Viewpoint Discrimination

[For inclusion before the Exercise, at p. 975]

McCullen involves a state law prohibiting certain types of communication within a statutorily proscribed "buffer zone" around abortion clinics. The disagreement between the justices in the case is whether this law is content-based, content-netural, viewpoint-based, or viewpoint neutral. Pay attention to how each opinion writer makes this determination. What types of things does each author consider when deciding how to categorize the law? Also consider what the legal significance of the categorization is: what test applies to each category?

McCullen v. Coakley

573 U.S. __, 134 S. Ct. 2518 (2014)

Majority: *Roberts* (CJ), Ginsburg, Breyer, Sotomayor, Kagan

Concurrence in the judgment: *Scalia*, Kennedy, Thomas; ***Alito***

ROBERTS, C. J., delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The question presented is whether the statute violates the First Amendment.

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—"for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral pro test, education, or counseling with such other person." Ibid. A separate provision subjected to criminal punishment anyone who "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." The statute was modeled on a similar Colorado law that this Court had upheld in

Hill v. Colorado, 530 U. S. 703 (2000). Relying on Hill, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge.

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute "on a routine basis." To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals' consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Department, however, testified that his officers had made "no more than five or so arrests" at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18-foot zones were so crowded with protestors that they resembled "a goalie's crease," making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. Id., at 69–71. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were "unenforceable." What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. Captain Evans agreed, explaining that such a zone would "make our job so much easier."

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

"No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any en trance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such en trance, exit or driveway

A "reproductive health care facility," in turn, is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." §120E1⁄2(a). The 35-foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to $500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between $500 and $5,000, up to two and a half years in prison, or both. The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance,

firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right- of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility.

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience.

In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions. … Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone—marked by a painted arc and a sign—surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. Id., at 293–295. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic. …Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. … Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public street. … Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts.

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners' facial challenge after a bench trial based on a stipulated record. The Court of Appeals for the First Circuit affirmed.

By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. These places—which we have labeled "traditional public fora"—"'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts be tween citizens, and discussing public questions.'"

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to pre serve an uninhibited marketplace of ideas in which truth will ultimately prevail," FCC v. League of Women Voters of Cal., 468 U. S. 364, 377 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." In particular, the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. Police Dept. of Chicago v. Mosley, 408 U. S. 92, 95 (1972). As a general rule, in such a forum the government may not "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others." Erznoznik v. Jacksonville, 422 U. S. 205, 209 (1975).

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' "

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by ex empting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. See United States v. Playboy Entertainment Group, Inc., 529 U. S. 803, 813 (2000). Respondents do not argue that the Act can survive this exacting standard. …

The Act applies only at a "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or per formed." Mass. Gen. Laws, ch. 266, §120E1⁄2(a). Given this definition, petitioners argue, "virtually all speech affected by the Act is speech concerning abortion," thus rendering the Act content based.

We disagree. To begin, the Act does not draw content based distinctions on its face. Contrast Boos v. Barry, 485 U. S. 312, 315 (1988) (ordinance prohibiting the display

within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into "'public odium'" or "'public disrepute'"); Carey v. Brown, 447 U. S. 455, 465 (1980) (statute prohibiting all residential picketing except "peaceful labor picketing"). The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. League of Women Voters of Cal., supra, at 383. But it does not. Whether petitioners violate the Act "depends" not "on what they say," Humanitarian Law Project, supra, at 27, but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply be- cause it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, supra, at 791. The question in such a case is whether the law is "'justified without reference to the content of the regulated speech.'" Renton v. Playtime Theatres, Inc., 475 U. S. 41, 48 (1986).

The Massachusetts Act is. Its stated purpose is to "in crease forthwith public safety at reproductive health care facilities." Respondents have articulated similar purposes before this Court—namely, "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." [Citations omitted]. It is not the case that "[e]very objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion."

We have previously deemed the foregoing concerns to be content neutral. See Boos, 485 U. S., at 321 (identifying "congestion," "interference with ingress or egress," and "the need to protect . . . security" as content-neutral concerns). Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature

evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion." Reply Brief 9.

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 451–452 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." Burson v. Freeman, 504 U. S. 191, 207 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment." In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

JUSTICE SCALIA objects that the statute does restrict more speech than necessary, because "only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses." But there are no grounds for inferring content based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by JUSTICE SCALIA goes to the question of narrow tailoring, which we consider below.

Petitioners also argue that the Act is content based because it exempts four classes of individuals, one of which comprises "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment." This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an "egregious form of content discrimination," Rosenberger v. Rector and Visitors of Univ. of Va., (1995). In particular, petitioners argue that the exemption allows clinic employees and agents— including the volunteers who "escort" patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that "an exemption from an other wise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' " City of Ladue v. Gilleo, (1994). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy side walk or

the security guard patrolling a clinic entrance, see App. 95 (affidavit of Michael T. Baniukiewicz).

Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical "scope of their employment" restriction on the exemption for "law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents." … There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. … Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways. …

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to enforce the Act equally against clinic escorts. While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement. It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. … The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones. We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." Ward, 491 U. S., at 796. The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demandng a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency." Riley v. National Federation of Blind of N. C., Inc., 487 U. S. 781, 795 (1988).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 491 U. S., at 799. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of " serving the government's interests. Id., at 798. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id., at 799.

As noted, respondents claim that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Brief for Respondents 27. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government's interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related services." Schenck v. Pro-Choice Network of Western N. Y., 519 U. S. 357, 376 (1997). The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious bur dens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. … These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she also says that she reaches "far fewer people" than she did before the amendment. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]."

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands. … n Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

Respondents also emphasize that the Act does not pre vent petitioners from engaging in various forms of "pro test"—such as chanting slogans and displaying signs— outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far

less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" by women within the buffer zones.

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their amici identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." If Massachusetts deter mines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. §248(a)(1), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. See Brief for State of New York et al. as Amici Curiae 13, and n. 6. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility." … All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like. … The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its purposes. …

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. As Captain Evans predicted in his legislative testimony, fixed buffer zones would "make our job so much easier."

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a

clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.

For similar reasons, respondents' reliance on our decision in Burson v. Freeman is misplaced. There, we upheld a state statute that established 100-foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. 504 U. S., at 193–194. We approved the buffer zones as a valid prophylactic measure, noting that existing "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." Id., at 206–207. Such laws were insufficient because "[v]oter intimidation and election fraud are . . . difficult to detect." Burson, 504 U. S., at 208. Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle.

We also noted in Burson that under state law, "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," with the result that "many acts of interference would go undetected." Id., at 207. Not so here. Again, the police maintain a significant presence outside Massachusetts abortion clinics. The buffer zones in Bur- son were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here. Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

I agree that the Massachusetts statute at issue in this case violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of view point, it is unconstitutional, see ante, at 10, and I believe the law clearly discriminates on this ground.

The Massachusetts statute generally prohibits any person from entering a buffer zone around an abortion clinic during the clinic's business hours, §120E1⁄2(c), but the law contains an exemption for "employees or agents of such facility acting within the scope of their employment." §120E1⁄2(b)(2). Thus, during business hours, individuals who wish to counsel against abortion or to criticize the particular clinic may not do so within the buffer zone. If they engage in such conduct, they commit a crime. See §120E1⁄2(d). By

contrast, employees and agents of the clinic may enter the zone and engage in any conduct that falls within the scope of their employment. A clinic may direct or authorize an employee or agent, while within the zone, to express favorable views about abortion or the clinic, and if the employee exercises that authority, the employee's conduct is perfectly lawful. In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work.

Consider this entirely realistic situation. A woman enters a buffer zone and heads haltingly toward the en trance. A sidewalk counselor, such as petitioners, enters the buffer zone, approaches the woman and says, "If you have doubts about an abortion, let me try to answer any questions you may have. The clinic will not give you good information." At the same time, a clinic employee, as instructed by the management, approaches the same woman and says, "Come inside and we will give you honest answers to all your questions." The sidewalk counselor and the clinic employee expressed opposing viewpoints, but only the first violated the statute.

Or suppose that the issue is not abortion but the safety of a particular facility. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee may not enter the buffer zone to warn about the clinic's health record, but an employee may enter and tell prospective clients that the clinic is safe.

It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.

The Court holds not only that the Massachusetts law is viewpoint neutral but also that it does not discriminate based on content. See ante, at 11–15. The Court treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral.

In this case, I do not think that it is possible to reach a judgment about the intent of the Massachusetts Legislature without taking into account the fact that the law that the legislature enacted blatantly discriminates based on viewpoint. In light of this feature, as well as the over breadth that the Court identifies, see ante, at 23–27, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth's asserted interests.

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E. Free Speech Doctrine in Special Contexts

1. Campaign Finance

Insert after RQE #5, at p. 1030:

6. In *Williams-Yulee v. The Florida Bar*, (2016), the Court upheld restrictions imposed by the Florida State Bar on the speech of candidates standing in *judicial* elections. Chief Justice Roberts, writing for the five-person majority, purported to apply strict scrutiny. In doing so, he said that the restriction at issue "advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech." Why is preserving public confidence in the integrity of the judiciary a different or sufficiently compelling interest than is preserving public confidence in legislative or executive officials? If the crucial distinction is the differing roles judges are supposed to play in our system, what does the distinction made by the Court say about how the justices view the role of non-judicial elected officials?

[*For inclusion before the final paragraph explaining post-Buckley v. Valeo developments, at p. 1031*]

The Court's most recent case in this area is *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). *McCutcheon* involved a challenge to the aggregate cap on contributions. Aggregate contribution caps limit how much money an individual can contribute to political candidates or organizations overall (rather than the per-candidate or per-organization limits). Aggregate caps were upheld in *Buckley,* on the grounds that they were necessary to avoid circumvention of the base caps (the caps on what an individual can donate to a single candidate or political organization. The regulatory scheme underlying this area is extremely complicated, but the basic idea is that without aggregate caps, the caps on donations to individual candidates could be circumvented by funneling donations through other groups.

McCutcheon struck down the aggregate caps. The plurality and dissent disagree vehemently about the practical effect of eliminating the aggregate caps. The dissent argues that the plurality decision in effect allows an individual donor to funnel as much as $2.37 million to a single candidate. The plurality argues that the type of circumvention relied on by the dissenters to reach that number is improbable, if not actually impossible.

Doctrinally, the most significant part of the case is its apparent narrowing by the plurality of the meaning of the type of legally relevant "corruption" the state has a compelling interest in preventing. The Court had been chipping away at the meaning of corruption for some time, but *McCutcheon* set out the new definition more clearly than had earlier cases, holding that:

> [W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—"quid pro quo" corruption. As Buckley explained, Congress may permissibly seek to rein in "large contributions [that] are given to secure a political quid pro quo from current and potential office holders." In addition to "actual quid pro quo arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates. Id., at 27; see also Citizens United, 558 U. S., at 359 ("When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption").
>
> Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. Id., at 359; see McConnell v. Federal Election Comm'n, 540 U. S. 93, 297 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part). And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access. See Citizens United, 558 U. S., at 360. … The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. …

Justice Breyer, writing in dissent, responded as follows:

> The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: "Congress may target only a specific type of corruption—'quid pro quo' corruption." It then defines quid pro quo corruption to mean no more than "a direct exchange of an official act for money"—an act akin to bribery. It adds specifically that corruption does not include efforts to "garner 'influence over or access to' elected officials or political parties." Moreover, the Government's efforts to prevent the "appearance of corruption" are "equally confined to the appearance of quid pro quo corruption," as narrowly defined. In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party (by donating to its various committees), because the rationale for any limit would "dangerously broade[n] the circumscribed definition of quid pro quo corruption articulated in our prior cases."
>
> This critically important definition of "corruption" is inconsistent with the Court's prior case law… [a]nd it misunderstands the constitutional importance of the interests at stake. In fact, constitutional interests—indeed, First Amendment interests—lie on both sides of the legal equation. … [T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself. ... [P]olitical communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives. … Corruption breaks the constitution ally necessary

"chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard.

… The upshot is that the interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.

* * *

B. Establishment Clause

* * *

[For inclusion before the Exercise, at p. 1106]

4. Legislative Prayer

Guided Reading Questions: *Town of Greece v. Galloway*

1. All of the justices agree that Marsh v. Chambers establishes a valid principle, allowing legislatures to open their sessions with a prayer. What is the main source of disagreement between the majority and the Kagan dissent? Try to summarize this in 1-2 sentences.

2. There was much discussion in the various opinions about the difficulty in establishing a constitutional test that would inquire into the content of legislative meeting prayers. As you read the opinions, think about how difficult this may or may not be. Are there other options to monitoring the content of the prayers? What does the majority say about whether the establishment clause can address the content of the prayers?

3. What is the point of Kagan's hypotheticals? Are there significant factual differences between the town council meeting and legislative sessions that make a difference to the analysis?

4. How and how much does the idea of coerciveness fit into the analysis? Justices Scalia and Thomas do not joint part II-B of the lead (Kennedy) opinion, addressing coerciveness. What do Scalia and Thomas say on this issue? What do the dissenters say?

Town of Greece v. Galloway

572 U.S. __, 134 S. Ct. 1811 (2014)

Majority: ***Kennedy***, Roberts (CJ), Alito; Scalia, Thomas (all but Part II-B)

Concurrences: ***Thomas, Alito***, Scalia

Dissents: ***Breyer; Kagan***, Ginsburg, Sotomayor

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a

prayer. It must be concluded, consistent with the Court's opinion in Marsh v. Chambers, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at

> Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now and forever more. Amen.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. [The District Court upheld the prayer practice on summary judgment. The Court of Appeals for the Second Circuit reversed.] Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity…. Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, the Court now reverses the judgment of the Court of Appeals

II

In Marsh v. Chambers, 463 U.S. 783 (1983), the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," Marsh, 463 U.S., at 792rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry….

Yet Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. In the 1850's, the judiciary committees in both the House and Senate reevaluated the

practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer; no faith was excluded by law, nor any favored; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). Marsh stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted….

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that Marsh did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," and the "saving sacrifice of Jesus Christ on the cross." Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

…. An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases…. Marsh nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content….

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact….

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian…. [E]ven seemingly general references to God or the Father might alienate nonbelievers or polytheists. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer

giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court….

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one….

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in Marsh on the ground that it coerces participation by nonadherents. They and some amici contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed….

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing….

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course….

This case can be distinguished from the conclusions and holding of Lee v. Weisman, 505 U.S. 577. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. Four Justices dissented in Lee, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest…. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." …

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

[T]he narrow aspect of the principal dissent…. is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." "Priests and ministers, rabbis and imams," the principal dissent continues, "give such invocations all the time" without any great difficulty….

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice…. Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder….

In addition, if a town attempts to go beyond simply recommending that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." …

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains.…

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in Marsh

v. Chambers, was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone…. But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is never permissible prior to meetings of local government legislative bodies….

The features of Greece meetings that the principal dissent highlights are by no means unusual. It is common for residents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at the beginning of such a meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, although the principal dissent, attaches importance to the fact that guest chaplains in the town of Greece often began with the words "Let us pray," that is also commonplace and for many clergy, I suspect, almost reflexive. In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

…. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

JUSTICE THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II–B, I join the opinion of the Court, which faithfully applies Marsh v. Chambers. I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," and to state my understanding of the proper "coercion" analysis.

I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue….

Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789…. The import of this history is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States.

The Federalist logic of the original Establishment Clause poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. See id., at 33. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." Newdow, 542 U.S., at 50 (opinion of THOMAS, J.)….

II

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." Lee v. Weisman, 505 U.S. 577, 640 (1992) (SCALIA, J., dissenting). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church….

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case. The majority properly concludes that "[o]ffense ... does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either.

JUSTICE BREYER, dissenting.

[I]t is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation:

"The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.

"The length of the prayer should not exceed 150 words.

"The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy."

The town made no effort to promote a similarly inclusive prayer practice here…. The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

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

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case….

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

• You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." The judge then asks your lawyer to begin the trial.

• It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in

Heaven....' " And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.

• You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit—it is with a due sense of reverence and awe that we come before you [today] seeking your blessing.... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen." Id., at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. See Tr. of Oral Arg. 3–4. Why?

The reason, of course, has nothing to do with Christianity as such….

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. But no one has disagreed with this much:

> [O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington ... down to the present day, has ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ. Lee v. Weisman, 505 U.S. 577, 641 (SCALIA, J., dissenting).

By authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts

not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in Marsh v. Chambers. And before I dispute the Town and Court, I want to give them their due: They are right that, under Marsh, legislative prayer has a distinctive constitutional warrant by virtue of tradition. … And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures."

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were more sectarian, and less inclusive, than anything this Court sustained in Marsh. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the public at large." Any members of the public who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery.

The longtime chaplain says something like the following (the excerpt is from his own amicus brief supporting Greece in this case): "O God, who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to Christ" after a single legislator complained. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See ibid.

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny. gov/planning/townboard (as visited May 2, 2014). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion; and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal) at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's town meeting." (He does not suggest that anyone should feel free not to participate.) And he says:

> The beauties of spring ... are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the

> Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so ... [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets.

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U.S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing Marsh, and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the public." The same is true in the U.S. Congress and, I suspect, in every other state legislature. As several Justices later noted (and the majority today agrees, see Marsh involved "government officials invok[ing] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead."

The very opposite is true in Greece: Contrary to the majority's characterization, see ante, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." He almost always begins with some version of "Let us all pray together." Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. He refers, constantly, to a collective "we"—to "our" savior, for

example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. Marsh characterized the prayers in the Nebraska Legislature as "in the Judeo–Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. And as the majority acknowledges, Marsh hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief"; had it been otherwise, the Court would have reached a different decision.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian—constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture. And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son."

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship). The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and ... ignorant of the history of our country."

C

Those three differences, taken together, remove this case from the protective ambit of Marsh and the history on which it relied. ….[C]ontra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition Marsh described. The Board's practice must, in its own particulars, meet constitutional requirements…. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed….

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." App. 99a. She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting—or even, as the majority proposes, that she stands up and leaves the room altogether, see ante, at 1826. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, it would do so no less if the Town's clergy always used the liturgy of some other religion.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," Marsh observed, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian

terms, common to diverse religious groups, then no one would have valid grounds for complaint. Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "[t]he First Amendment is not a majority rule," as the Court (headspinningly) suggests; what does that is the Board's refusal to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here—the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide.

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the prayer arises and the audience to whom it is directed." But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than (as in the forums it discusses) to the lawmakers….

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in other government bodies….

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. Ceremonial references to the divine surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. But prayers evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of [one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers is a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews….

"It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike ... immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790). That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group….

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

Review Questions and Explanations: *Town of Greece v. Galloway*

1. What doctrinal rule emerges from Part II-A of the majority opinion?

2. Do you agree with Alito that Kagan's hypotheticals are "highly imaginative" (i.e., either far-fetched or off-point)? Alito does not disagree with Kagan's contention that they would represent Establishment Clause violations. Do they

3. Alito argues that the dissent's approach creates a level of complexity and uncertainty that might result in towns forgoing pre-session prayers altogether. Do you agree? Is that consistent with his assertion that the scope of the dissent's objection is "really quite niggling"? Suppose town councils did forgo pre-session prayers—why is that problematic?

4. Thomas argues that the establishment clause is not an individual right and therefore should not be applicable to the states (by incorporation through the Fourteenth Amendment). Presumably this means that states would be free to establish an official state religion, and perhaps even to discriminate on the basis of religion. Even assuming—which is by no means clear—that such was the original intent of the framers (but see Madison's "Memorial and Remonstrance," at pp. 1078-79), should we return to such a constitutional understanding? Is such "originalism" a sound constitutional approach to matters of social attitudes other than religion—such as race, familial privacy, or sexual orientation? Note that Thomas has signed onto a number of opinions asserting that the constitution's structural doctrines of federalism and separation of powers are designed, and should be interpreted, to promote individual liberty. (See, e.g., Bond v. United States; NFIB v. Sebelius.) Is it consistent to say that the Establishment Clause should be not be construed as a protection of individual liberty because it is "a federalism provision"?

5. The majority opinion says "In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." Is this statement consistent with the Court's treatment of the concept of coercion in *McCreary County v. ACLU?*

C. The Free Exercise Clause

[For inclusion following *Sherbert v.Verner*, p. 1111]

The following case, *United States v. Lee,* presents a different slant on the type of free exercise claim seen in *Sherbert* (above) and *Smith* (below). In *Sherbert* and *Smith* (as well as the cases discussed in *Sherbert*) the claimant's request for accommodation involved a "direct" conflict with the claimant's religious belief. "Direct" is an imperfect word in this context; what we mean by it is that the conduct required by the challenged regulation required the claimant to himself engage directly in conduct prohibited by his religion. In *Lee,* in contrast, the claim was not that the challenged regulation required the claimant himself to engage directly in religiously prohibited conduct, but rather that it required him to be complicit in a scheme that itself was in conflict with his religious beliefs. The thing prohibited by the religious belief, in other words, was complicity in the sins of others.

This type of claim is not unique in moral or religious systems. Consider, for example, the following two assertions: 1) I have a religious obligation to refrain from engaging in genocide; and 2) I have a religious obligation to not support a regime that engages in genocide. Both types of claims can and do have moral and religious salience; the question is whether they should be treated the same or differently for Free Exercise purposes, particularly when granting exemptions based on complicity claims has the potential to increase - perhaps dramatically - the effect of the exemption on other people, as well as on the government's ability to efficiently govern.

United States v. Lee
455 U.S. 252 (1982)

Majority: ***Burger*** (CJ), Brennan, White, Marshall, Blackmun, Powell, Rehnquist, O'Connor

Concurrence in the judgment: ***Stevens***

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. 40 U.S. 993 (1981). The District Court concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion. We reverse.

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers,

withhold social security tax from his employees, or pay the employer's share of social security taxes [ ] and then sued in the United States District Court for the Western District of Pennsylvania for a refund, claiming that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees.

The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. The court noted that the Amish believe it sinful not to provide for their own elderly and needy, and therefore are religiously opposed to the national social security system. The court also accepted appellee's contention that the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system. The District Court observed that, in light of their beliefs, Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes. The court's holding was based on both the exemption statute for the self-employed and the First Amendment; appellee and others "who fall within the carefully circumscribed definition provided in § 142(g) are relieved from paying the employer's share of [social security taxes], as it is an unconstitutional infringement upon the free exercise of their religion.

The exemption provided by § 1402(g) is available only to self-employed individuals, and does not apply to employers or employees. Consequently, appellee and his employees are not within the express provisions of § 1402(g). Thus, any exemption from payment of the employer's share of social security taxes must come from a constitutionally required exemption.

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Indian Employment Security Div.,* (1981). We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end, of the inquiry. Not all burdens on religion are unconstitutional. *See, e.g., Prince v. Massachusetts,* (1944); *Reynolds v. United States* (1879). The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by

providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965). Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms, and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in, and contribution to, the social security system is very high.

The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. In *Braunfeld v. Brown,* (1961), this Court noted that "to make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing . . . prosecution."

The difficulty in attempting to accommodate religious beliefs in the area of taxation is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld,* The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld.*

Unlike the situation presented in *Wisconsin v. Yoder,* it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference -- in theory at least -- is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. [Citations omitted]. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in

the social security system. In § 1402(g), Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise. Accordingly, the judgment of the District Court is reversed, and the case is remanded for proceedings consistent with this opinion. *Reversed and remanded.*

JUSTICE STEVENS, concurring in the judgment.

… Congress already has granted the Amish a limited exemption from social security taxes. As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system, because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits. In view of the fact that the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal. Thus, if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard, as formulated by the Court, has not been met.

The Court rejects the particular claim of this appellee not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk, because the Amish claim applies only to a small religious community with an established welfare system of its own. Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim. I believe, however, that this reasoning supports the adoption of a different [less exacting] constitutional standard than the Court purports to apply.

> **FN:** In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government -- whether it be the legislature or the courts -- out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

The Court's analysis supports a holding that there is virtually no room for a "constitutionally required exemption" on religious grounds from a valid tax law that is entirely neutral in its general application. Because I agree with that holding, I concur in the judgment.

* * * *

[For inclusion following *Church of Lukumi Babalu Aye, Inc.,* p. 1127]

The Affordable Care Act (studied in Chapter 1) included a requirement that most employers providing health insurance plans to their employees as part of their compensation package include coverage for certain types of preventative care coverage. The federal agency charged with rulemaking authority to implement this requirement determined that contraceptive care was within the scope of the congressional command, thus creating the so-called "contraception mandate." Various employers challenged this requirement, on various grounds. Two of those cases, those brought by Hobby Lobby, Inc. and Conestoga Wood Specialties, made their way to the Supreme Court, resulting in the following decision.

Hobby Lobby v. Burwell is not a constitutional case; the Court takes care to note that its decision rests on statutory, not constitutional grounds. But the statute at issue is the Religious Freedom Restoration Act. You have seen this law before: it was passed, with overwhelming bi-partisan support, shortly after the Court decided *Employment Division v. Smith*. The decision grapples with many of the same principles discussed in the Free Exercise cases, and may be indicative of how the Court will decide those cases in the future.

Guided Reading Questions: *Burwell v. Hobby Lobby* and *Wheaton College*

1. As noted above, *Hobby Lobby* is not a Free Exercise case. When reading the case, make sure to pay attention to the relationship between the First Amendment's Free Exercise clause and RFRA.

2. There are at least three distinct issues in the case: 1) should commercial corporations such as Hobby Lobby and Conestoga enjoy the protection of RFRA at all; 2) how should a Court evaluate whether an asserted religious belief is sincere, and whether that belief is "substantially burdened" by the challenged law; and 3) what test does RFRA impose and how is that test different from the pre- and post-Smith Free Exercise cases; 4) is that test satisfied here? Each one of these issues is complex; pay careful attention to the arguments made by the majority and dissent in regard to each of them.

3. As has become common, Justice Kennedy provides the crucial fifth vote, but writes separately to stake out the limits of his agreement with the majority opinion. What is essential in his separate opinion – by which we mean, what limitations does he seem willing to impose on the scope of the majority opinion.

4. The *Wheaton College* injunction was issued just a few days after the decision in *Hobby Lobby* was announced. Is the Court's decision to grant the injunction consistent

with *Hobby Lobby*?

Burwell v Hobby Lobby Stores

573 U. S. __, 189 L. Ed. 2d 675 (2014)

Majority: ***Alito,*** *Roberts, Scalia, Kennedy* and *Thomas*

Concurrence: ***Kennedy***

Dissent: ***Ginsburg***, *Sotomayor; Breyer* and *Kagan* (joining in all but Part III-C-1)

ALITO, J., delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

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 non- profit 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." Post, at 1 (opinion of GINSBURG, J.). 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." Post, at 1–2. 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."

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in Employ ment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like Sherbert v. Verner, 374 U. S. 398 (1963), and Wisconsin v. Yoder, 406 U. S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in Sherbert that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U. S., at 408–409. And in Yoder, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years.

In Smith, however, the Court rejected "the balancing test set forth in Sherbert." Smith concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the Sherbert test, held that the denial of benefits violated the Free Exercise Clause.

This Court then reversed, observing that use of the Sherbert test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations

of almost every conceivable kind." The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores, 521 U. S. 507, 514 (1997).

Congress responded to Smith by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U. S. C. §2000bb(a)(2); see also §2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if he burden substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. In City of Boerne, however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith."

Following our decision in City of Boerne, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." See §2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment. See §2000bb– 2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." …

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." Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. … 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.

… 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. …

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."

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences. … 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 s we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It

included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

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." (emphasis added).

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. … s we noted above, RFRA applies to "a person's" exercise of religion, 42 U. S. C. §§2000bb–1(a), (b), 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." 1 U. S. C. §1.

Under the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

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. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see Gonzales v. O Centro Espírita Beneficiente União do Vegetal, 546 U.S. 418 (2006) (RFRA); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. ___ (2012) (Free Exercise); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA. This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term "person" includes some but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. …

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? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns. If the corporate form is not enough, what about the profit-making objective? In Braunfeld, 366 U. S. 599, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." Smith, 494 U. S., at 877. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion. …

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." … So long as its owners agree, a for-profit corporation may take costly pollution-control and energy conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well. …

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the "exercise of religion" within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-Smith Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase "exercise of religion under the First Amendment" was meant to be tied to this Court's pre-Smith interpretation of that Amendment. … Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior

reference to the First Amendment, see 42 U. S. C. §2000bb–2(4) (2000 ed.) (incorporating §2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-Smith free-exercise cases. … Third, the one pre-Smith case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In Gallagher v. Crown Kosher Super Market of Mass, the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for- profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the merits based on the reasoning in Braunfeld, and reserved decision on the question whether the corporation had "standing" to raise the claim. …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 which HHS refers will often assert RFRA claims.

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. …

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. 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. …

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. See, e.g., Smith, 494 U. S., at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim"); Hernandez v. Commissioner, 490 U. S. 680, 699 (1989); Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440, 450 (1969). … [I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," id., at 716, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a religious objection to the subsidies. As we put it in Tilton, they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U. S., at 689 (plurality opinion); see Allen, supra, at 249 ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion"). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

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

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and

"gender equality." RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see Griswold v. Connecticut, 381 U. S. 479, 485–486 (1965), and HHS tells us that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services." …

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

The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. … The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see §2000bb–1(b)(2), that this is not a viable alternative. … 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. …

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."

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. 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," post, at 28 (internal quotation marks omitted), because their employers' insurers would be responsible for providing information and coverage. …

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. See post, at 32–33. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the work- force 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." Ibid. 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." Ibid.

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. …

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 in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion. It is so ordered.

JUSTICE KENNEDY, concurring.

… As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers-burdening one while accommodating the other-when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that

an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place.

"[T]he American community is today, as it long has been, a rich mosaic of religious faiths." Town of Greece v. Galloway. 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.

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. See ante, at 16–49. 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.

"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, 505 U. S. 833, 856 (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. …

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga right assert is foreclosed by this Court's decision in Employment Div., Dept. of Human Resources of Ore. v. Smith. … Even if Smith did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties. 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. [Citation omitted]. 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.'" …

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, 374 U. S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." See also §2000bb(a)(5) ("[T]he 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."); ante, at 48 (agreeing that the pre-Smith compelling interest test is "workable" and "strike[s] sensible balances").

The legislative history is correspondingly emphatic on RFRA's aim. See, e.g., S. Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA's purpose was "only to overturn the Supreme Court's decision in Smith," not to "unsettle other areas of the law."); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was "designed to restore the compelling interest test for deciding free exercise claims."). In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to Smith for guidance." Senate Report 8. See also H. R. Rep. No. 103– 88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to Smith, without "creat[ing] . . . new rights for any religious practice or for any potential litigant." 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act's moderate purpose, it is hardly surprising that RFRA's enactment in 1993 provoked little controversy. (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives). …

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-Smith jurisprudence. To support its conception of RFRA as a measure detached from this Court's decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which altered RFRA's definition of the term "exercise of religion." RFRA, as originally enacted, defined that term to mean "the exercise of religion under the First Amendment to the Constitution." As amended by RLUIPA, RFRA's definition now includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." That definitional change, according to the Court, reflects "an obvious effort to effect a complete separation from First Amendment case law."

The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. [Citations omitted]. …

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. …

The Dictionary Act's definition [ ] controls only where "context" does not "indicat[e] otherwise." §1. Here, context does so indicate. RFRA speaks of "a person's exercise of religion." … 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." Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." Citizens United v. Federal Election Comm'n, 558 U. S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

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." Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment). The Court's "special solicitude to the rights of religious organizations," Hosanna-Tabor Evangelical Lutheran Church and School however, is just that. No such solicitude is traditional for commercial organizations. Until today, 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. … 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. …

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. …Citing Braunfeld v. Brown, the Court questions why, if "a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't . . . do the same?" Ante, at 22 (footnote omitted). But even accepting, arguendo, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, Braunfeld is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits. 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. …

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.

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. …

Bowen v. Roy is instructive. There, the Court rejected a free exercise challenge to the Government's use of a Native American child's Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father's religious belief that "use of [his daughter's Social Security] number may harm [her] spirit," the Court concluded that the Government's internal uses of that number "place[d] [no] restriction on what [the father] may believe or what he may do." Recognizing that the father's "religious views may not accept" the position that the challenged uses concerned only the Government's internal affairs, the Court explained that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's

religion, must supply the frame of reference." Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see supra, at 3–6, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

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

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. [… It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage …] The Court ultimately acknowledges a critical point: RFRA's application "must take adequate account of the burdens a requested accommodation may impose on non- beneficiaries." 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. See Prince v. Massachusetts, 321 U. S. 158, 177 (1944) (Jackson, J., dissenting) ("[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

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. … 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. 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, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U. S. 290, 303 (1985), or according women equal pay for substantially similar work, see Dole v. Shenandoah Baptist Church, 899 F. 2d 1389, 1392 (CA4 1990)? 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. …

Among the path marking pre-Smith decisions RFRA preserved is United States v. Lee, 455 U. S. 252 (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. The Government urges that Lee should control the challenges brought by Hobby Lobby and Conestoga. In contrast, today's Court dismisses Lee as a tax case. Indeed, it was a tax case and the Court in Lee homed in on "[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation."

But the Lee Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity." The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in Lee that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g., Newman v. Piggie Park Enterprises, Inc., (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff 'd in relevant part and rev'd in part on other grounds, 377 F.2d 433 (CA4

1967), aff'd and modified on other grounds, 390 U. S. 400 (1968); In re Minnesota ex rel. McClure, 370 N. W. 2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for- profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dismissed, 478 U. S. 1015 (1986); Elane Photog raphy, LLC v. Willock, 2013–NMSC–040, ___ N. M. ___, 309 P. 3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U. S. ___ (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine . . . the plausibility of a religious claim"?

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

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

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," Lee, 455 U. S., at 263, n. 2 (Stevens, J., concurring in judgment), 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.

* * * *

Wheaton College, a self-identified "evangelical protestant" non-profit college in Illinois, claimed a religious exemption from the ACA for coverage of "abortifacient"

contraceptives in its health insurance for its employees. Although governing regulations provide an "accommodation" to religious institutions in this situation, the accommodation requires the employer to file a "self-certification" of the institution's religious beliefs with the insurer or third-party health plan administrator. Employees would be able to obtain the contraception coverage, but the expenses would not be charged to the employer. Wheaton College filed suit in December 2013, in part objecting to this procedure on the ground that by filing the form, it would be complicit in the provision of contraceptives to which it religiously objects.

The federal district court in Illinois denied Wheaton's motion for preliminary injunction on June 23, 2014. With a June 30 administrative deadline pending, Wheaton filed a motion with the Seventh Circuit for an emergency injunction pending appeal, on June 26. When this was not granted, Wheaton filed a motion for an emergency injunction with Justice Kagan, in her role as circuit justice for the Seventh Circuit. While a justice will sometimes act alone in ruling on purely procedural matters, it is customary to refer merits or potentially controversial issues to the full Court. Justice Kagan apparently did so, and it appears that the full Court, by a 6-3 vote, issued the following ruling. In essence the ruling grants Wheaton's motion for a preliminary injunction pending a final decision on the merits.

Wheaton College v. Burwell

On Application for Inunction, July 3, 2014

The application for an injunction having been submitted to JUSTICE KAGAN and by her referred to the Court, the Court orders: If the applicant informs the Secretary of Health and Human Services in writing that it is a non- profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators.

Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives. The Government contends that the applicant's health insurance issuer and third-party administrator are required by federal law to provide full contraceptive coverage regardless whether the applicant completes EBSA Form 700.

The applicant contends, by contrast, that the obligations of its health insurance issuer and third-party administrator are dependent on their receipt of notice that the applicant objects to the contraceptive coverage requirement. But the applicant has already notified the Government— without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.

In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits.

JUSTICE SCALIA concurs in the result.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, dissenting.

The Patient Protection and Affordable Care Act, through its implementing regulations, requires employer group health insurance plans to cover contraceptive services without cost sharing. Recognizing that people of religious faith may sincerely oppose the provision of contraceptives, the Government has created certain exceptions to this requirement. Churches are categorically exempt. Any religious nonprofit is also exempt, as long as it signs a form certifying that it is a religious nonprofit that objects to the provision of contraceptive services, and provides a copy of that form to its insurance issuer or third-party administrator. The form is simple. The front asks the applicant to attest to the foregoing representations; the back notifies third-party administrators of their regulatory obligations.

The matter before us is an application for an emergency injunction filed by Wheaton College, a nonprofit liberal arts college in Illinois. There is no dispute that Wheaton is entitled to the religious-nonprofit exemption from the contraceptive coverage requirement. Wheaton nonetheless asserts that the exemption itself impermissibly burdens Wheaton's free exercise of its religion in violation of the Religious Freedom Restoration Act of 1993 (RFRA) on the theory that its filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects. Wheaton has not stated a viable claim under RFRA. Its claim ignores that the provision of contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law.

Even assuming that the accommodation somehow burdens Wheaton's religious exercise, the accommodation is permissible under RFRA because it is the least restrictive means of furthering the Government's compelling interests in public health and women's well-being. Indeed, just earlier this week in *Burwell v. Hobby Lobby Stores*, the Court described the accommodation as "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 [Food and Drug Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." And the Court concluded that the accommodation "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in Hobby Lobby feared it might (GINSBURG, J., dissenting) retreats from that position. That action evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution.

Even if one accepts Wheaton's view that the self- certification procedure violates RFRA, that would not justify the Court's action today. The Court grants Wheaton a form

of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act, 28 U. S. C. §1651, blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims and in which those courts have declined requests for similar injunctive relief. Injunctions of this nature are proper only where "the legal rights at issue are indisputably clear." Turner Broadcasting System, Inc. v. FCC, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers) (internal quotation marks omitted). Yet the Court today orders this extraordinary relief even though no one could credibly claim Wheaton's right to relief is indisputably clear.

The sincerity of Wheaton's deeply held religious beliefs is beyond refute. But as a legal matter, Wheaton's application comes nowhere near the high bar necessary to warrant an emergency injunction from this Court. For that reason, I respectfully dissent.

To invoke the accommodation and avoid civil penalties, a religious nonprofit need only file a self-certification form stating (1) that it "opposes providing coverage for some or all of any contraceptive services required to be covered under [the regulation] on account of religious objections," (2) that it "is organized and operates as a nonprofit entity," and (3) that it "holds itself out as a religious organization." The form is reprinted in an appendix to this opinion. Any organization that completes the form and provides a copy to its insurance issuer or third-party administrator need not "contract, arrange, pay, or refer for contraceptive coverage" to which it objects. 78 Fed. Reg. 39874 (2013); see 29 CFR §2590.715–2713A(b)(1) and (c)(1). Instead, the insurance issuer or third-party adminstrator must provide contraceptive coverage for the organization's employees and may not charge the organization any premium or other fee related to those services. The back of the self-certification form reminds third-party administrators that receipt of the form constitutes notice that they must comply with their regulatory obligations.

Rather than availing itself of this simple accommodation, Wheaton filed suit, asserting that completing the form and submitting it to its third-party administrator would make it complicit in the provision of contraceptive coverage, in violation of its religious beliefs. On that basis, it sought a preliminary injunction, claiming that the law and regulations at issue violate RFRA, which provides that the Government may not "substantially burden a person's exercise of religion" unless the application of that burden "is the least restrictive means of furthering [a] compelling governmental interest."

Wheaton's RFRA claim plainly does not satisfy our demanding standard for the extraordinary relief it seeks. …

As to the merits, Wheaton's claim is likely to fail under any standard, let alone the standard that its entitlement to relief be " 'indisputably clear,' " Wheaton asserts that filing the self-certification form might ultimately result in the provision of contraceptive services to its employees, thereby burdening its religious exercise. And it points out that if it does not file the form, it will face civil penalties. But it is difficult to understand how these arguments make out a viable RFRA claim.

RFRA requires Wheaton to show that the accommodation process "substantially burden[s] [its] exercise of religion." "Congress no doubt meant the modifier 'substantially' to carry weight." Hobby Lobby, 573 U. S., at ___ (GINSBURG, J., dissenting). Wheaton, for religious reasons, categorically opposes the provision of

contraceptive services. The Government has given it a simple means to opt out of the contraceptive coverage mandate—and thus avoid any civil penalties for failing to provide contraceptive services—and a simple means to tell its third-party administrator of its claimed exemption.

Yet Wheaton maintains that taking these steps to avail itself of the accommodation would substantially burden its religious exercise. Wheaton is "religiously opposed to emergency contraceptives because they may act by killing a human embryo." And it "believes that authorizing its [third-party administrator] to provide these drugs in [its] place makes it complicit in grave moral evil." Wheaton is mistaken—not as a matter of religious faith, in which it is undoubtedly sincere, but as a matter of law: Not every sincerely felt "burden" is a "substantial" one, and it is for courts, not litigants, to identify which are. See Hobby Lobby, 573 U. S., at ___ (GINSBURG, J., dissenting). Any provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations. The law and regulations require, in essence, that some entity provide contraceptive coverage. A religious nonprofit's choice not to be that entity may leave someone else obligated to provide coverage instead— but the obligation is created by the contraceptive coverage mandate imposed by law, not by the religious nonprofit's choice to opt out of it.

Let me be absolutely clear: I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs. But thinking one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so. … Here, similarly, the filing of the self-certification form merely indicates to the third-party administrator that a religious nonprofit has chosen to invoke the religious accommodation. If a religious nonprofit chooses not to pay for contraceptive services, it is true that someone else may have a legal obligation to pay for them, just as someone may have to go to war in place of the conscientious objector. But the obligation to provide contraceptive services, like the obligation to serve in the Armed Forces, arises not from the filing of the form but from the underlying law and regulations.

It may be that what troubles Wheaton is that it must participate in any process the end result of which might be the provision of contraceptives to its employees. But that is far from a substantial burden on its free exercise of religion. … The Court's approach imposes an unwarranted and unprecedented burden on the Government's ability to administer an important regulatory scheme. The Executive is tasked with enforcing Congress' mandate that preventative care be available to citizens at no cost beyond that of insurance. In providing the accommodation for which Wheaton is eligible, the Government has done a salutary thing: exempt religious organizations from a requirement that might otherwise burden them. Wheaton objects, however, to the minimally burdensome paperwork necessary for the Government to administer this accommodation. If the Government cannot require organizations to attest to their views by way of a simple self-certification form and notify their third-party administrators of their claimed exemption, how can it ever identify the organizations eligible for the accommodation and perform the administrative tasks necessary to make the accommodation work? The self-certification form is the least intrusive way for the Government to administer the accommodation. All that a religious organization must do

is attest to the views that it holds and notify its third-party administrator that it is exempt. The Government rightly accepts that attestation at face value; it does not question whether an organization's views are sincere. It is not at all clear to me how the Government could administer the religious nonprofit accommodation if Wheaton were to prevail. …

Our jurisprudence has over the years drawn a careful boundary between majoritarian democracy and the right of every American to practice his or her religion freely. We should not use the extraordinary vehicle of an injunction under the All Writs Act to work so fundamental a shift in that boundary. Because Wheaton cannot justify the relief it seeks, I would deny its application for an injunction, and I respectfully dissent from the Court's refusal to do so.

Review Questions and Explanations: *Hobby Lobby* and *Wheaton*

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1. Several states have state law-based "contraception mandates" requiring employers to provide the same coverage mandated by the ACA and rejected in *Hobby Lobby*. Does *Hobby Lobby* prohibit a state enforcing these laws?

2. The majority and the dissent disagree about whether RFRA should be read as incorporating the test used in the Court's pre-Smith case law, or whether the statute goes beyond the free exercise protection offered in those cases. What turns on this dispute? Would the outcome change if the majority applied the Free Exercise test used by the Court before *Smith*? How would its analysis differ?

3. How is the claim made by Hobby Lobby factually different from the claims made by the plaintiffs in *Sherbert, Smith* and *Lee*? Set aside for the moment the legal significance of those differences, and just list them. Then make a list of the similarities between the claims. When you've completed your lists, consider how the majority and the dissent use these factual differences when making their legal arguments.

4. Justice Alito notes in his majority opinion that the Department of Health and Human Services "acknowledges" that the four methods of birth control challenged in the case "may result in the destruction of an embryo." Whether that is correct, as a matter of scientific fact, is contested, even if the litigants chose to not fight about it. But ssume for a moment that it is incorrect: that this simply is not how these methods of birth control work. Would the plaintiffs' claim to an exception from the law, based on their religious opposition to abortion, still warrant judicial deference?

5. Assume that *Wheaton College* returns to the Court for a decision on the merits. How should the Court decide the case? See if you can use the test developed in *Hobby Lobby* to sketch out an opinion, paying particular attention to the views expressed by Justice Kennedy in that case.