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Problem: Targeting Assets

It has long been suspected that the government of Upper Riparia has encouraged and abetted acts of terrorism against Americans. Several years ago, victims of those terrorist attacks sued the Government of Upper Riparia in United States District Court for the Southern District of New York. After consolidating those cases under the title *Jackson v. Government of Upper Riparia*, the court issued default judgments against Upper Riparia, in the amount of several billion dollars. The plaintiffs have attempted to collect on those judgments by having the court attach assets of the Central Bank of Upper Riparia held by New York City-based banks. Those efforts have floundered because of foreign sovereign immunity principles.

In order to overcome those roadblocks, Congress last year enacted the Upper Riparia Terrorism Justice Act. That statute reads as follows:

> "Financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Jackson v. Government of Upper Riparia*, Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by attachments secured by the plaintiffs in those proceedings, and that are proven to be the sole property of the government of Upper Riparia or any of its subdivisions, may be obtained by that court in order to satisfy any federal court judgment against the Government of Upper Riparia that is rendered based on illegal terrorist activities committed by that government."

When the district court attempts to seize those assets, the Central Bank files a motion to quash the seizure, alleging that the statute violates the separation of powers by prescribing a rule of decision. What result?

After you've thought about this, read the following opinion.

Bank Markazi v. Peterson
136 S.Ct. 1310 (2016)

Justice GINSBURG delivered the opinion of the Court.*

A provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 makes available for postjudgment execution a set of assets held at a New York bank for Bank Markazi, the Central Bank of Iran. The assets would partially satisfy judgments gained in separate actions by over 1,000 victims of terrorist acts sponsored by Iran. The judgments remain unpaid. Section 8772 is an unusual statute: It designates a particular set of assets and renders them available to satisfy the liability and damages judgments underlying a consolidated enforcement proceeding that the statute identifies by the District Court's docket number. The question raised by petitioner Bank Markazi: Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?

Section 8772, we hold, does not transgress constraints placed on Congress and the President by the Constitution. The statute, we point out, is not fairly portrayed as a "one-case-only regime." Rather, it covers a category of postjudgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars. Section 8772 subjects the designated assets to execution "to satisfy *any* judgment" against Iran for damages caused by specified acts of terrorism. Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative. . . .

I

A

. . . . American nationals may file suit against state sponsors of terrorism in the courts of the United States. . . .This authorization—known as the "terrorism exception"—is among enumerated exceptions prescribed in the Foreign Sovereign Immunities Act of 1976 (FSIA) to the general rule of sovereign immunity.

. . . After gaining a judgment, however, plaintiffs proceeding under the terrorism exception "have often faced practical and legal difficulties" at the enforcement stage. Subject to stated exceptions, the FSIA shields foreign-state property from execution. . . . Further limiting judgment-enforcement prospects, the FSIA shields from execution property "of a foreign central bank or monetary authority held for its own account."

To lessen these enforcement difficulties, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA), which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of a terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." . . . Invoking his authority under [a related statute] the President, in February 2012, issued an Executive Order blocking "all property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States." The availability of these assets for execution, however, was contested.

To place beyond dispute the availability of some of [these] blocked assets for satisfaction of judgments rendered in terrorism cases, Congress passed the statute at issue here: § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772. . . . § 8772 provides that, if a court makes specified findings, "a financial asset . . .

* Justice THOMAS joins all but Part II–C of this opinion.

shall be subject to execution . . . in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by" the acts of terrorism enumerated in the FSIA's terrorism exception. § 8772(a)(1). Section 8772(b) defines as available for execution by holders of terrorism judgments against Iran "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings."

Before allowing execution against an asset described in § 8772(b), a court must determine that the asset is:

> "(A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> "(B) a blocked asset (whether or not subsequently unblocked) . . .; and
>
> "(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran. . . ." § 8772(a)(1).

In addition, the court in which execution is sought must determine "whether Iran holds equitable title to, or the beneficial interest in, the assets . . . and that no other person possesses a constitutionally protected interest in the assets . . . under the Fifth Amendment to the Constitution of the United States." § 8772(a)(2).

B

Respondents are victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members. Numbering more than 1,000, respondents rank within 16 discrete groups, each of which brought a lawsuit against Iran pursuant to the FSIA's terrorism exception. . . . Upon finding a clear evidentiary basis for Iran's liability to each suitor, the court entered judgments by default. . . . "Together, [respondents] have obtained billions of dollars in judgments against Iran, the vast majority of which remain unpaid." The validity of those judgments is not in dispute.

To enforce their judgments, the 16 groups of respondents . . . moved under Federal Rule of Civil Procedure 69 for turnover of about $1.75 billion in bond assets held in a New York bank account—assets that, respondents alleged, were owned by Bank Markazi. This turnover proceeding began in 2008 when the terrorism judgment holders . . . filed writs of execution and the District Court restrained the bonds. . . . Making the findings necessary under § 8772, the District Court ordered the requested turnover.

In reaching its decision, the court reviewed the financial history of the assets and other record evidence showing that Bank Markazi owned the assets. . . . After § 8772's passage, Bank Markazi . . . conceded that Iran held the requisite "equitable title to, or beneficial interest in, the assets," § 8772(a)(2)(A), but maintained that § 8772 could not withstand inspection under the separation-of-powers doctrine. . . . The District Court disagreed. . . . The Court of Appeals for the Second Circuit unanimously affirmed. . . . To consider the separation-of-powers question Bank Markazi presents, we granted certiorari, and now affirm.

II

Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison* (1803) [*Supra* this Chapter]. Necessarily, that endowment of authority blocks Congress from "requiring federal courts to exercise the judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc.* (1995) [*Supra* this Chapter]. Congress, no doubt, "may not usurp a court's power to interpret and apply the law to the [circumstances] before it,"

for "those who apply a rule to particular cases, must of necessity expound and interpret that rule," *Marbury*.[17] And our decisions place off limits to Congress "vesting review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*. Congress, we have also held, may not "retroactively command the federal courts to reopen final judgments." *Plaut*.

A

Citing *United States v. Klein*, 13 Wall. 128 (1872) [Note *supra* this Chapter], Bank Markazi urges a further limitation. Congress treads impermissibly on judicial turf, the Bank maintains, when it "prescribes rules of decision to the Judicial Department . . . in [pending] cases." According to the Bank, § 8772 fits that description. *Klein* has been called "a deeply puzzling decision." More recent decisions, however, have made it clear that *Klein* does not inhibit Congress from "amending applicable law." *Robertson*; *Plaut* (*Klein*'s "prohibition does not take hold when Congress 'amends applicable law.'" (quoting *Robertson*)). Section 8772, we hold, did just that.

Klein involved Civil War legislation providing that persons whose property had been seized and sold in wartime could recover the proceeds of the sale in the Court of Claims upon proof that they had "never given any aid or comfort to the present rebellion." In 1863, President Lincoln pardoned "persons who . . . participated in the . . . rebellion" if they swore an oath of loyalty to the United States. One of the persons so pardoned was a southerner named Wilson, whose cotton had been seized and sold by Government agents. Klein was the administrator of Wilson's estate. In *United States v. Padelford*, 9 Wall. 531 (1870), this Court held that the recipient of a Presidential pardon must be treated as loyal, *i.e.*, the pardon operated as "a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion." Thereafter, Klein prevailed in an action in the Court of Claims, yielding an award of $125,300 for Wilson's cotton.

During the pendency of an appeal to this Court from the Court of Claims judgment in *Klein*, Congress enacted a statute providing that no pardon should be admissible as proof of loyalty. Moreover, acceptance of a pardon without disclaiming participation in the rebellion would serve as conclusive evidence of disloyalty. The statute directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon. Affirming the judgment of the Court of Claims, this Court held that Congress had no authority to "impair the effect of a pardon," for the Constitution entrusted the pardon power "to the executive alone." *Klein*. The Legislature, the Court stated, "cannot change the effect of . . . a pardon any more than the executive can change a law." *Id.* Lacking authority to impair the pardon power of the Executive, Congress could not "direct a court to be instrumental to that end." *Ibid.* In other words, the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe. See *id.*; *Robertson* (Congress may not "compel . . . findings or results under old law").[19]

Bank Markazi, as earlier observed, argues that § 8772 conflicts with *Klein*. The Bank points to a statement in the *Klein* opinion questioning whether "the legislature may prescribe rules of decision to the Judicial Department . . . in cases

[17] Consistent with this limitation, respondents rightly acknowledged at oral argument that Congress could not enact a statute directing that, in "Smith v. Jones," "Smith wins." Tr. of Oral Arg. 40. Such a statute would create no new substantive law; it would instead direct the court how pre-existing law applies to particular circumstances. THE CHIEF JUSTICE challenges this distinction, but it is solidly grounded in our precedent. See *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, (1992) [Note *supra* this Chapter] (A statute is invalid if it "fail[s] to supply new law, but direct[s] results under old law.").

[19] Given the issue before the Court—Presidential pardons Congress sought to nullify by withdrawing federal-court jurisdiction—commentators have rightly read *Klein* to have at least this contemporary significance: Congress "may not exercise [its authority, including its power to regulate federal jurisdiction,] in a way that requires a federal court to act unconstitutionally." Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2549 (1998).

pending before it." One cannot take this language from *Klein* "at face value," however, "for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized." See, *e.g.*, *United States v. Schooner Peggy*, 1 Cranch 103 (1801). As we explained in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the restrictions that the Constitution places on retroactive legislation "are of limited scope":

> "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing . . . laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art. I, §§ 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application."

"Absent a violation of one of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope." *Id*. So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases. See *Plaut*. Any lingering doubts on that score have been dispelled by *Robertson* and *Plaut*.

Bank Markazi argues most strenuously that § 8772 did not simply amend pre-existing law. Because the judicial findings contemplated by § 8772 were "foregone conclusions," the Bank urges, the statute "effectively" directed certain factfindings and specified the outcome under the amended law. Recall that the District Court, closely monitoring the case, disagreed. [District court opinion] ("[The] determinations [required by § 8772] [were] not mere fig leaves," for "it [was] quite possible that the court could have found that defendants raised a triable issue as to whether the blocked [a]ssets were owned by Iran, or [whether other banks] had some form of beneficial or equitable interest.").

In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. "When a plaintiff brings suit to enforce a legal obligation it is not any less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." . . .

Resisting this conclusion, THE CHIEF JUSTICE compares § 8772 to a hypothetical "law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings." Of course, the hypothesized law would be invalid—as would a law directing judgment for Smith, for instance, if the court finds that the sun rises in the east. For one thing, a law so cast may well be irrational and, therefore, unconstitutional for reasons distinct from the separation-of-powers issues considered here. For another, the law imagined by the dissent does what *Robertson* says Congress cannot do: Like a statute that directs, in "Smith v. Jones," "Smith wins," it "compels . . . findings or results under old law," for it fails to supply any new legal standard effectuating the lawmakers' reasonable policy judgment.[22] By contrast, § 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets. Applying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.

[22] The dissent also analogizes § 8772 to a law that makes "conclusive" one party's flimsy evidence of a boundary line in a pending property dispute, notwithstanding that the governing law ordinarily provides that an official map establishes the boundary. Section 8772, however, does not restrict the evidence on which a court may rely in making the required findings. A more fitting analogy for depicting § 8772's operation might be: In a pending property dispute, the parties contest whether an ambiguous statute makes a 1990 or 2000 county map the relevant document for establishing boundary lines. To clarify the matter, the legislature enacts a law specifying that the 2000 map supersedes the earlier map.

B

Section 8772 remains "unprecedented," Bank Markazi charges, because it "prescribes a rule for a single pending case—identified by caption and docket number." The amended law in *Robertson*, however, also applied to cases identified by caption and docket number, and was nonetheless upheld. Moreover, § 8772 . . . facilitates execution of judgments in 16 suits, together encompassing more than 1,000 victims of Iran-sponsored terrorist attacks. Although consolidated for administrative purposes at the execution stage, the judgment-execution claims brought pursuant to Federal Rule of Civil Procedure 69 were not independent of the original actions for damages and each claim retained its separate character.

The Bank's argument is further flawed, for it rests on the assumption that legislation must be generally applicable, that "there is something wrong with particularized legislative action." *Plaut*. We have found that assumption suspect:

> "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that [the Clause] requires not merely 'singling out' but also *punishment*, see, *e.g., United States v. Lovett*, 328 U.S. 303 (1946), [or] a case [holding] that Congress may legislate 'a legitimate class of one,' *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)." *Ibid.* . . .

* * *

For the reasons stated, we are satisfied that § 8772—a statute designed to aid in the enforcement of federal-court judgments—does not offend "separation of powers principles . . . protecting the role of the independent Judiciary within the constitutional design." The judgment of the Court of Appeals for the Second Circuit is therefore *Affirmed.*

Chief Justice ROBERTS, with whom Justice SOTOMAYOR joins, dissenting.

Imagine your neighbor sues you, claiming that your fence is on his property. His evidence is a letter from the previous owner of your home, accepting your neighbor's version of the facts. Your defense is an official county map, which under state law establishes the boundaries of your land. The map shows the fence on your side of the property line. You also argue that your neighbor's claim is six months outside the statute of limitations.

Now imagine that while the lawsuit is pending, your neighbor persuades the legislature to enact a new statute. The new statute provides that for your case, and your case alone, a letter from one neighbor to another is conclusive of property boundaries, and the statute of limitations is one year longer. Your neighbor wins. Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to ensure your neighbor's victory, or the court, which presided over the *fait accompli*?

That question lies at the root of the case the Court confronts today. Article III of the Constitution commits the power to decide cases to the Judiciary alone. See *Stern v. Marshall*, 564 U.S. 462 (2011) [Note *supra* this Chapter]. Yet, in this case, Congress arrogated that power to itself. Since 2008, respondents have sought $1.75 billion in assets owned by Bank Markazi, Iran's central bank, in order to satisfy judgments against Iran for acts of terrorism. The Bank has vigorously opposed those efforts, asserting numerous legal defenses. So, in 2012, four years into the litigation, respondents persuaded Congress to enact a statute, 22 U.S.C. § 8772, that for this case alone eliminates each of the defenses standing in respondents' way. Then, having gotten Congress to resolve all outstanding issues in their favor, respondents returned to court . . . and won.

Contrary to the majority, I would hold that § 8772 violates the separation of powers. No less than if it had passed a law saying "respondents win," Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.

I

A

Article III, § 1 of the Constitution vests the "judicial Power of the United States" in the Federal Judiciary. That provision, this Court has observed, "safeguards the role of the Judicial Branch in our tripartite system." *Commodity Futures Trading Comm'n v. Schor* (1986) [*Supra* this Chapter]. It establishes the Judiciary's independence by giving the Judiciary distinct and inviolable authority. "Under the basic concept of separation of powers," the judicial power "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern*. The separation of powers, in turn, safeguards individual freedom. As Hamilton wrote, quoting Montesquieu, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *The Federalist* No. 78; see Montesquieu, *The Spirit of the Laws*.

The question we confront today is whether § 8772 violates Article III by invading the judicial power.

B

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*. We surveyed those ruins in *Plaut* to determine the scope of the judicial power under Article III, and we ought to return to them today for that same purpose.

Throughout the 17th and 18th centuries, colonial legislatures performed what are now recognized as core judicial roles. . . . The judicial power exercised by colonial legislatures was often expressly vested in them by the colonial charter or statute. Legislative involvement in judicial matters intensified during the American Revolution, fueled by the "vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies."

The Revolution-era "crescendo of legislative interference with private judgments of the courts," however, soon prompted a "sense of a sharp necessity to separate the legislative from the judicial power." *Plaut*. In 1778, an influential critique of a proposed (and ultimately rejected) Massachusetts constitution warned that "if the legislative and judicial powers are united, the maker of the law will also interpret it; and the law may then speak a language, dictated by the whims, the caprice, or the prejudice of the judge." In Virginia, Thomas Jefferson complained that the assembly had, "in many instances, decided rights which should have been left to judiciary controversy." And in Pennsylvania, the Council of Censors—a body appointed to assess compliance with the state constitution—decried the state assembly's practice of "extending their deliberations to the cases of individuals" instead of deferring to "the usual process of law," citing instances when the assembly overturned fines, settled estates, and suspended prosecutions. "There is reason to think," the Censors observed, "that favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief." . . .

The States' experiences ultimately shaped the Federal Constitution, figuring prominently in the Framers' decision to devise a system for securing liberty through the division of power:

> "Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them." *Plaut*. . . .

As Professor Manning has concluded, "Article III, in large measure, reflects a reaction against the practice" of legislative interference with state courts. Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 *Colum. L. Rev.* 1648 (2001).

Experience had confirmed Montesquieu's theory. The Framers saw that if the "power of judging . . . were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary." They accordingly resolved to take the unprecedented step of establishing a "truly distinct" judiciary. *The Federalist* No. 78 (A. Hamilton). To help

ensure the "complete independence of the courts of justice," *ibid.*, they provided life tenure for judges and protection against diminution of their compensation. But such safeguards against indirect interference would have been meaningless if Congress could simply exercise the judicial power directly. The central pillar of judicial independence was Article III itself, which vested "the judicial Power of the United States" in "one supreme Court" and such "inferior Courts" as might be established. The judicial power was to be the Judiciary's alone.

II

A

Mindful of this history, our decisions have recognized three kinds of "unconstitutional restrictions upon the exercise of judicial power." *Plaut*. Two concern the effect of judgments once they have been rendered: "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch," *ibid.*, for to do so would make a court's judgment merely "an advisory opinion in its most obnoxious form," And Congress cannot "retroactively command the federal courts to reopen final judgments," because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Id.* Neither of these rules is directly implicated here.

This case is about the third type of unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 does precisely that, changing the law—for these proceedings alone—simply to guarantee that respondents win. The law serves no other purpose—a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute "sweeps away . . . any . . . federal or state law impediments that might otherwise exist" to bar respondents from obtaining Bank Markazi's assets. . . .

Section 8772 authorized attachment, moreover, only for the

> "financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings. . . ." § 8772(b).

And lest there be any doubt that Congress's sole concern was deciding this particular case, rather than establishing any generally applicable rules, § 8772 provided that nothing in the statute "shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than" these. § 8772(c).

B

There has never been anything like § 8772 before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings. That fact alone is "perhaps the most telling indication of the severe constitutional problem" with the law. Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut*.

Section 8772 violates the bedrock rule of Article III that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *Klein*. *Klein* arose from congressional opposition to conciliation with the South, and in particular to the pardons Presidents Lincoln and Johnson had offered to former Confederate rebels. Although this Court had held that a pardon was proof of loyalty and entitled its holder to compensation in the Court of Claims for property seized by Union forces during the war, see *United States v. Padelford*, 9 Wall. 531 (1870), the Radical Republican Congress wished to prevent pardoned rebels from obtaining such compensation. It therefore enacted a law prohibiting claimants from using a pardon as evidence of loyalty, instead requiring the Court of Claims and Supreme Court to dismiss for want of jurisdiction any suit based

on a pardon.

Klein's suit was among those Congress wished to block. Klein represented the estate of one V.F. Wilson, a Confederate supporter whom Lincoln had pardoned. On behalf of the estate, Klein had obtained a sizable judgment in the Court of Claims for property seized by the Union. The Government's appeal from that judgment was pending in the Supreme Court when the law targeting such suits took effect. The Government accordingly moved to dismiss the entire proceeding.

This Court, however, denied that motion and instead declared the law unconstitutional. It held that the law "passed the limit which separates the legislative from the judicial power." The Court acknowledged that Congress may "make exceptions and prescribe regulations to the appellate power," but it refused to sustain the law as an exercise of that authority. Instead, the Court held that the law violated the separation of powers by attempting to "decide" the case by "prescribing rules of decision to the Judicial Department of the government in cases pending before it." "It is of vital importance," the Court stressed, that the legislative and judicial powers "be kept distinct."

The majority characterizes *Klein* as a delphic, puzzling decision whose central holding—that Congress may not prescribe the result in pending cases—cannot be taken at face value.[2] It is true that *Klein* can be read too broadly, in a way that would swallow the rule that courts generally must apply a retroactively applicable statute to pending cases. See *United States v. Schooner Peggy*, 1 Cranch 103 (1801). But *Schooner Peggy* can be read too broadly, too. Applying a retroactive law that says "Smith wins" to the pending case of *Smith v. Jones* implicates profound issues of separation of powers, issues not adequately answered by a citation to *Schooner Peggy*. And just because *Klein* did not set forth clear rules defining the limits on Congress's authority to legislate with respect to a pending case does not mean—as the majority seems to think—that Article III itself imposes no such limits.

The same "record of history" that drove the Framers to adopt Article III to implement the separation of powers ought to compel us to give meaning to their design. *Plaut*. The nearly two centuries of experience with legislative assumption of judicial power meant that "the Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities." Article III vested the judicial power in the Judiciary alone to protect against that threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot.

The Court says it would reject a law that says "Smith wins" because such a statute "would create no new substantive law." Of course it would: Prior to the passage of the hypothetical statute, the law did not provide that Smith wins. After the passage of the law, it does. Changing the law is simply how Congress acts. The question is whether its action constitutes an exercise of judicial power. Saying Congress "creates new law" in one case but not another simply expresses a conclusion on that issue; it does not supply a reason.

"Smith wins" is a new law, tailored to one case in the same way as § 8772 and having the same effect. All that both statutes "effectuate," in substance, is lawmakers' "policy judgment" that one side in one case ought to prevail. The cause for concern is that though the statutes are indistinguishable, it is plain that the majority recognizes no limit under the separation of powers beyond the prohibition on statutes as brazen as "Smith wins." Hamilton warned that the Judiciary must take "all possible care . . . to defend itself against [the] attacks" of the other branches. *The Federalist*

[2] The majority instead seeks to recast *Klein* as being primarily about congressional impairment of the President's pardon power, despite *Klein*'s unmistakable indication that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns. 13 Wall., at 147 ("The rule prescribed is *also* liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." (emphasis added)). The majority then suggests that *Klein* stands simply for the proposition that Congress may not require courts to act unconstitutionally. That is without doubt a good rule, recognized by this Court since *Marbury*. But it is hard to reconstruct *Klein* along these lines, given its focus on the threat to the separation of powers from allowing Congress to manipulate jurisdictional rules to dictate judicial results. See Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 *Harv. L. Rev.* 1362, 1373 (1953) ("[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it . . . as the Court itself made clear long ago in *United States v. Klein*.").

No. 78. In the Court's view, however, Article III is but a constitutional Maginot Line, easily circumvented by the simplest maneuver of taking away every defense against Smith's victory, without saying "Smith wins."

Take the majority's acceptance of the District Court's conclusion that § 8772 left "plenty" of factual determinations for the court "to adjudicate." All § 8772 actually required of the court was two factual determinations—that Bank Markazi has an equitable or beneficial interest in the assets, and that no other party does, § 8772(a)(2)—both of which were well established by the time Congress enacted § 8772. Not only had the assets at issue been frozen pursuant to an Executive Order blocking "property of the Government of Iran," but the Bank had "repeatedly insisted that it is the sole beneficial owner of the Blocked Assets." By that measure of "plenty," the majority would have to uphold a law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings, and that Smith's claim was within the statute of limitations. In reality, the Court's "plenty" is plenty of nothing, and, apparently, nothing is plenty for the Court. See D. Heyward & I. Gershwin, *Porgy and Bess*: Libretto 28 (1958).

It is true that some of the precedents cited by the majority have allowed Congress to approach the boundary between legislative and judicial power. None, however, involved statutes comparable to § 8772. In *Robertson v. Seattle Audubon Soc.*, for example, the statute at issue referenced particular cases only as a shorthand for describing certain environmental law requirements, not to limit the statute's effect to those cases alone. And in *Plaut*, the Court explicitly distinguished the statute before it—which directed courts to reopen final judgments in an entire class of cases—from one that "'singles out' any defendant for adverse treatment (or any plaintiff for favorable treatment)." *Plaut*, in any event, held the statute before it *invalid*, concluding that it violated Article III based on the same historical understanding of the judicial power outlined above.[3]

I readily concede, without embarrassment, that it can sometimes be difficult to draw the line between legislative and judicial power. That should come as no surprise; Chief Justice Marshall's admonition "that 'it is a *constitution* we are expounding' is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution—that of separation of powers." But however difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line. The Court's failure to enforce that boundary in a case as clear as this reduces Article III to a mere "parchment barrier against the encroaching spirit" of legislative power. *The Federalist* No. 48 (J. Madison). . . .

* * *

At issue here is a basic principle, not a technical rule. Section 8772 decides this case no less certainly than if Congress had directed entry of judgment for respondents. As a result, the potential of the decision today "to effect important change in the equilibrium of power" is "immediately evident." Hereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases. Today's decision will indeed become a "blueprint for extensive expansion of the legislative power" at the Judiciary's expense, feeding Congress's tendency to "extend the sphere of its activity and draw all power into its impetuous vortex," *The Federalist* No. 48 (J. Madison).

I respectfully dissent.

[3] We have also upheld Congress's long practice of settling individual claims involving public rights, such as claims against the Government, through private bills. But the Court points to no example of a private bill that retroactively changed the law for a single case involving private rights.

Note: *Patchak v. Zinke*

1. In 2018 the Court decided another case that again tested the limits of Congress's power to enact hyper-specific, outcome-directing legislation, and, conversely, the meaning of *United States v. Klein* (1872) (*supra.* this Chapter). *Patchak v. Zinke*, 138 S.Ct. 897 (2018) involved a plot of land the Department of the Interior claimed for a Native tribe, which desired it in order to build a casino. A neighboring landowner sued to block the government's action, and the Supreme Court held in 2012 that the suit could proceed. After that decision, Congress enacted a statute that "reaffirmed" the property as land held by the government in trust for the tribe. The statute then continued:

> "NO CLAIMS:—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as the date of the enactment of this Act) relating to the land described [in the earlier section of the statute] shall not be filed or maintained in a Federal court and shall be promptly dismissed."

Based on this provision, the lower court dismissed the plaintiff's claim, and the appellate court affirmed.

2. The Supreme Court affirmed that dismissal and upheld the provision quoted above. Writing for a plurality of four justices, Justice Thomas described the provision as a simple stripping of federal court jurisdiction, which Congress had ample authority to enact under cases such as *Ex parte McCardle* (1868) (*supra.* this Chapter.) He rejected the argument that the provision violated the rule announced in *Klein*, explaining that case as focusing on Congress's attempt to change the effect of a presidential pardon. He also noted that the provision in *Patchak* operated as a general stripping of jurisdiction over all cases implicating the particular property, rather than as a targeted statute.

Justice Breyer joined the plurality, but wrote separately to stress his view that the jurisdiction-stripping provision simply confirmed the statute's other provision that reaffirmed the substance of the government's decision to take the land in question into trust for the tribe. Justice Ginsburg, joined by Justice Sotomayor, concurred in the judgment. She argued that the case could be resolved on a narrower ground, by reading the provision in question as a withdrawal of the federal government's prior waiver of sovereign immunity from lawsuits challenging its actions. Justice Sotomayor wrote a separate concurrence, to note her agreement with the dissent, but also to explain that she ultimately concurred in the judgment favoring the government based on Justice Ginsburg's sovereign immunity theory.

3. Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, dissented. He described the provision at issue as "brazen" "in terms of dictating a particular outcome [and] singling out a single party." He noted that, while the provision purported to address any lawsuit regarding the property, as a practical matter the law impacted the one lawsuit the Court confronted, given the expiration of the statute of limitations on any other challenges to the government's action. He stated: "Contrary to the plurality, I would hold that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case." In response to the plurality's conclusion that the provision changed the law, and thus did not "dictate results"

under existing law (as *Klein* prohibited), the Chief Justice stated: "In my view, the concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts."

Engaging the precedents, the Chief Justice suggested that "[r]ead for all it is worth, the decision [in *McCardle*] is . . . inconsistent with the approach the Court took . . . in *Klein*." Nevertheless, he suggested a more limited reading of *McCardle*, which focused on the generally-applicable nature of the jurisdiction stripping the law in that case accomplished and the availability, through alternate means, of judicial review of McCardle's complaint. (On this point the Chief Justice cited *Ex parte Yerger* (1869) (Note *supra.* this Chapter.) He concluded that neither of these features characterized the provision at issue in *Patchak*.

4. You've now encountered the most important cases considering Congress's power to—at the very least—come very close to the line separating the legislative and the judicial power: *McCardle*, *Klein*, *Seattle Audubon*, *Bank Markazi*, and *Patchak*. Can these cases be reconciled? Is there a principled line between the federal legislative power (including the power to prescribe, and thus strip, the jurisdiction of the federal courts) and the federal judicial power? Or does Congress always win—as it won in each of these cases except for *Klein*—except when, as in *Klein* itself, the statute infringes on *presidential* power? Note that the plurality in *Patchak* and the majority in *Bank Markazi* explained *Klein* in this way—that is, as a statute that was unconstitutional because it infringed on the pardon power. Does that mean that congressional encroachment on the *judicial* power, by itself, has no constitutional significance? Or does something remain of an independent, judicially-enforceable, "judicial power" after these cases? If so, how would you describe it?

C. Self-Imposed Limits on the Judicial Power

1. The Political Question Doctrine

Insert at page 63, before the Note:

Note: Gerrymandering and Judicially Manageable Standards

1. One of the most heated recent controversies involving the political question doctrine concerns the practice of legislative district gerrymandering. Gerrymandering is the practice by which legislative district lines are drawn so as to maximize electoral victories by the political party in charge of drawing those lines. In most cases, the district line-drawing process is done by politicians.

Under Supreme Court precedent, such districts must be essentially equal in population. *See Reynolds v. Sims*, 377 U.S. 533 (1964). But, especially given modern data processing technology, district line-drawers today can create districts that come close to perfectly maximizing one party's legislative district victories. They can accomplish this either by "packing" members of the opposing party into relatively few districts that the opposing party wins by overwhelming margins (with that opposing party thus "wasting" many of its votes), or by "cracking" areas of opposition strength by splitting those areas across several districts, which the opposing party loses by small

but consistent margins. Politicians have gerrymandered since the start of the Republic; indeed, the name "gerrymander" comes from Elbridge Gerry, a Massachusetts governor in the early 19th century who oversaw the creation of legislative districts drawn to favor his Democratic-Republican Party, one of which was said to resemble a salamander by being long and slender and thus packing opposition Federalist voters into it. The difference today is technology: modern data processing technology allows district map-drawers to draw exceptionally precise lines, down to the individual home level, that makes such "packing" and "cracking" extremely efficient for the party in charge of the process.

2. For at least nearly fifty years, the Supreme Court has struggled over claims made by voters of the disfavored party that such gerrymanders violate their constitutional rights. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973). One claim such voters often made is that such gerrymanders violated their equal protection rights by making their votes systematically count for less than votes of supporters of the dominant party. Plaintiffs also claimed that partisan gerrymanders violated their First Amendment rights, by penalizing them (via giving less weight to their votes) based on their First Amendment-protected political associations. More generally, challengers to partisan gerrymandering argue that that practice undermines democracy by decoupling electoral results from voters' expressed preferences.

Despite the weightiness of such claims, over the course of the last several decades the Court has been unable to decide whether they feature what the political question doctrine calls "judicially manageable standards" allowing courts to reach the merits. A major roadblock to judicial review is that the Court has long recognized the legitimacy of line-drawers taking account of partisan considerations when drawing district lines. Thus, unlike, for example, claims of *racial* gerrymandering, challenges to *partisan* gerrymandering encounter the difficulty of determining when partisan gerrymanders cross the line from a legitimate use of partisan considerations to an illegitimate infringement on the rights of members of the minority party. Over the last generation, the difficulty of identifying a legal standard distinguishing valid from invalid partisan gerrymanders, and in deciding whether such a standard even exists, has bedeviled the Court.

3. In 2019, the Court closed the federal courthouse door to such claims, deciding that they constituted political questions. In *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), the Court considered partisan gerrymandering claims from North Carolina and Maryland. In North Carolina, the Republican-controlled state government adopted a map that led, in 2016, to Republicans winning 10 of the state's 13 congressional seats despite winning only 53% of the vote, and in 2018 winning 9 of 12 districts despite winning only 50% of the vote (with the 13th district still undecided, based on a claim of election fraud). In Maryland, the Democratic-controlled state government adopted a map that effectively changed the long-standing composition of the state's House of Representatives delegation from Democrats holding 5 or 6 seats and Republicans holding 2 or 3, to Democrats holding 7 seats and Republicans reduced to one, even though during the period in which that map was used Democrats never won more than 65% of the statewide vote for members of the House.

4. Despite these stark results, a five-justice majority held that challenges to partisan gerrymanders constituted political questions that federal courts could not decide. Writing for that

majority, Chief Justice Roberts stressed that the Court was not condoning partisan gerrymanders. However, he concluded that no judicially manageable criteria existed to determine when they violated the Constitution. He observed that such claims inevitably pointed toward requiring proportional representation (that is, an electoral result in which legislative district results more or less mirror the overall statewide vote each party won). But he noted that the Constitution did not require such proportionality.

Without a requirement of proportionality, he continued, it became impossible to determine how skewed an electoral result would have to be before it was sufficiently unfair as to demand a judicial strike-down. He wrote the following:

> The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion).
>
> On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.
>
> Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (opinion concurring in judgment). *See id.* (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").
>
> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Chief Justice Roberts then continued, immediately after the excerpt above:

> And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and

> how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.
>
> If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth* (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.* (opinion of Kennedy, J.).

After rejecting approaches offered by the plaintiffs, their *amici*, the dissent, and the lower courts in these and other cases, Chief Justice Roberts observed that other vehicles, such as state constitutional law litigation and both state-level and federal political action (including citizen ballot initiatives to reform the process) could be and were being mobilized to rein in unacceptable partisan gerrymandering.

5. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented. She argued that lower federal courts and state courts had in fact developed standards that addressed extreme partisan gerrymanders without involving them in political or partisan decision-making. Referring to and quoting the trial courts in the North Carolina and Maryland cases, she wrote:

> both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim [which applied to both equal protection and First Amendment arguments against such gerrymandering]. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Applying this standard, Justice Kagan noted the record evidence of lawmakers' intent to engage in partisan gerrymandering and concluded that the effects of the resulting plans placed the new district maps at the very extreme of feasible maps favoring Republicans (in North Carolina) and Democrats (in Maryland). Thus, she would have upheld the conclusions reached by the trial courts in these cases.

6. Chief Justice Roberts acknowledged the dissent's proposed standard but found it inadequate. Remarking on the intent requirement, he observed that it was borrowed from the Court's racial gerrymandering jurisprudence. But, he argued, that latter jurisprudence

rested on a different foundation: "A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'" As for the effects prong, he wrote:

> The District Court [in the North Carolina case] tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer* (opinion of O'Connor, J.).

7. Justice Kagan also discounted the likely effect of legislative or citizen efforts to rein in gerrymandering. She observed that state legislators had no incentive to reform the process, and she noted that fewer than half the states allowed for citizen initiatives such as those calling for redistricting reform. Finally, she queried why the Court found itself unable to adjudicate partisan gerrymandering claims when, as the majority noted, state courts were in fact engaged in that very effort.

8. Partisan gerrymandering is a complex subject, both in its details and its relation to political question analysis. As you consider the subject, and Chief Justice Roberts' and Justice Kagan's disagreement about whether federal courts have access to legal standards for reviewing such gerrymanders, consider what the term "judicially manageable standards" means to both justices. Do you think such standards exist in partisan gerrymandering cases? As you'll see later in this class, and as you may already know from other law school classes, inquiries into "intent," "effects," and "causation" are all standard tools of judicial analysis. Is it the partisan gerrymandering context that arguably makes them not judicially manageable? If so, why?

9. More generally, leave aside whether you think such standards existed in *Rucho*. If you were asked simply to describe what the term "judicially manageable standards" means, based on the partisan gerrymandering example, what would you say?

2. The Case or Controversy Requirement

b. Standing

Insert at page 104, before the Note:

Problem: Standing

Read the following two fact patterns, and analyze whether and why (or why not) the plaintiff(s) in each case would have standing.

1. Wrestling with Standing

Title IX of the federal Civil Rights Act of 1964 prohibits the federal government from funding any institution that "fails to provide equal opportunities to both sexes." In 1975, the Department

of Education, which is responsible for distributing federal assistance to private universities and colleges, promulgated a regulation regarding gender equity in intercollegiate sports, to enforce Title IX. The regulation states that "The Department determines whether an institution provides equal athletic opportunities to both sexes by examining, *inter alia*, 'whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.'"

In 1990 the Department issued guidelines clarifying the 1975 regulation. Those guidelines explain that an institution's compliance with the "interests and abilities" requirement of the 1975 regulation will be assessed pursuant to a three-part test that asks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The guidelines explain that satisfaction of any one prong of this three-pronged test will satisfy the 1975 regulation.

Over the course of the succeeding two decades, several colleges eliminate their men's wrestling programs, or demote them from intercollegiate to "club" status. A group of wrestling coaches and college wrestling fans sue the Department. They do not challenge the underlying 1975 regulation; instead, they argue that the 1990 guidelines are too rigid, and violate both the 1975 Regulation and the 1964 law.

Would the coaches have standing? The fans? Why or why not?

2. Witnessing Animal Cruelty

Tom Jenkovic loves to visit zoos. Whenever he travels to a city on business he makes it a point to visit that city's zoo. On a recent business trip to Kansas City, when Tom visited the Kansas City Zoological Park, he was appalled to witness what he believed to be the substandard, inhumane conditions in which several primates were exhibited. After researching the matter, he comes across the federal Animal Welfare Act (AWA), which seeks to ensure that animals kept in captivity are treated humanely. Tom alleges that the AWA requires the Department to issue stringent regulations regarding primates' living conditions, and further alleges that the Department has failed to issue such regulations.

Does Tom have standing? Why or why not?

Note: Packing and Cracking, but not Standing

1. In 2018, the Court decided a highly-anticipated case in which plaintiffs raised constitutional objectives to allegedly partisan gerrymandering of legislative electoral districts. This is an issue that the Court has struggled with for decades, without ever identifying a legal standard by which such claims could be judged. The Court in the 2018 case, *Gill v. Whitford*, 138 S.Ct. 1916 (2018), did not even reach that question, though, as it concluded that, at least in its current incarnation, the case did not feature plaintiffs who had standing to sue. Recall that this supplement's political question materials, above, include a note on a 2019, *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), in which the Court found such claims to be non-justiciable political question. This note deals with a case from the year before, which considered a different preliminary issue: the plaintiffs' standing to sue.

2. Understanding the Court's standing analysis requires understanding the underlying nature of gerrymandering, and the legal claims gerrymandering triggers. It is settled law that legislative districts—for example, seats in a state legislature—must be nearly equal in population. However, it is still possible—and with computer-aided technology and sophisticated voter data collection, easier and easier—to draw equally-sized legislative districts that nevertheless skew toward one party or another. Because districting is usually done by state legislatures, the party in charge of the legislature has a great incentive to draw districts that maximize that party's ability to win legislative seats.

Legislatures drawing electoral lines can accomplish this by "packing" and "cracking" the voters who tend to vote for the opposition party. When a legislature "packs" those votes, it draws districts so as to include—or "pack"— as many possible opposition voters into as few districts as possible. This means that the opposition party will win by exceptionally large margins in those districts, but will win in few other districts. Alternatively, gerrymandering can be accomplished by "cracking" areas that support the opposition party, by running the district boundary line through the middle of that area, thus placing half of those voters in one district and half in the other. By "cracking" those areas, the legislators drawing those lines can hope to create two districts that feature close races, but races that nonetheless consistently produce wins for the party drawing the lines. For more explanation about packing and cracking and the history of partisan gerrymandering, see the note on *Rucho* in the political question materials.

The plaintiffs in *Gill*, Democratic voters in Wisconsin, alleged that the Republican legislators who drew the lines for the Wisconsin legislature's districts engaged in both packing and cracking. They alleged that this gerrymandering deprived them of equal protection, by making it harder for them to win the election of the legislature they desired, and their First Amendment rights to associate with like-minded voters without undue interference from the state. As noted earlier, these types of claims had long bedeviled the Court, which has never established a clear legal standard governing such claims.

3. The Court unanimously held that the plaintiffs lacked standing. Writing for the Court, Chief Justice Roberts explained that the remedy the plaintiffs sought—the restructuring of district lines statewide—outran the injury the plaintiffs had suffered—the dilution of each plaintiff's vote as a consequence of being "packed" into a district where the plaintiff's preferred party would likely win without her vote or being "cracked" into a district where the plaintiff's preferred party would likely lose even with her vote. The remedy for such dilution, he explained, would simply be to restructure the district in question and the surrounding districts, rather than restructuring every district in the state.

> The plaintiffs, however, also alleged a broader injury that presumably required a statewide remedy: their inability to achieve the policy results they preferred from the Wisconsin legislature, due to the legislature's composition under the challenged district lines. The Court expressed concern about this statement of injury, characterizing it as a concern about "group political interests, not individual legal rights." He connected this concern to the Court's hesitation about accepting generalized grievances as adequate for Article III standing purposes.

Despite these conclusions, the Chief Justice explained that the Court would not direct the lower court simply to dismiss the case. Describing *Gill* as "not the usual case" where dismissal would be appropriate, the Court instead directed the lower court to give the plaintiffs another chance to present evidence that would allow them to assert standing. In explaining this decision, he noted the history discussed earlier in this note of the Court struggling to find a justiciable standard governing such claims, and the fact that several of the plaintiffs had established that they did in fact live in "packed" or "cracked" districts.

4. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, joined the majority opinion but wrote separately to suggest legal theories that might in fact allow the plaintiffs to demonstrate standing. For example, she observed that the alleged gerrymandering in *Gill* made it more difficult for the Democratic Party and its members to do their work, given the additional hurdles the gerrymandering imposed on the prospect of electoral success for Democrats. Such difficulties, she suggested, might rise to the level of interferences with those persons' First Amendment rights to political association. In turn, such injuries might call for a statewide remedy of the sort that the Court found was inappropriate for the plaintiffs' vote dilution claims at issue in the litigation up to now.

Justice Thomas, joined by Justice Gorsuch, joined the majority except to the extent it remanded the case for further proceedings. By contrast, Justice Thomas would have directed an outright dismissal.

5. Details aside, *Gill*'s standing analysis illustrates, yet again, the close connection between standing doctrine and the legal claim asserted by the plaintiffs. Recall that the nature of the vote dilution claim the plaintiffs asserted was such that the statewide remedy they requested was inappropriate. By contrast, a different legal theory asserting a different injury might in fact merit such a statewide remedy. On that point, recall *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) and *Northeast Chapter of the Associated General Contractors of America v. Jacksonville,*

508 U.S. 636 (1993) (both notes *supra.* this Chapter). Those cases illustrated how reconceptualizing the harm suffered by the plaintiffs in those cases necessarily changed the standing analysis. The Court's and Justice Kagan's analyses in *Gill* illustrate how different legal theories can have the same effect.

6. As a postscript, in 2019 the Court got past the standing bar to these types of claims. In *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), the Court observed that the Court had remanded the *Rucho* cases (one from North Carolina and one from Maryland, each of which involved alleged unconstitutional partisan gerrymanders) to the lower courts for reconsideration in light of *Gill*. Those courts found that the plaintiffs had standing, and ruled in their favor on the merits. As set forth in a note earlier in this supplement, when the cases returned to the Court, it concluded, in 2019, that those cases presented political questions that the Court could not decide.

c. Mootness

Insert at the bottom of page 124:

Problem: Prisoner Placement in Special Housing Units

Your client is Justin Jackson, a federal prisoner who has served seven years of a 20-year sentence for a crime of which he was duly convicted. He explains to you that he has served those seven years in four different prisons. At each of the four prisons, he was placed in a "Special Housing Unit," or "SHU," sometimes for administrative reasons (*e.g.*, overcrowding in the general housing units) and sometimes for disciplinary reasons. SHUs are considered less desirable than the general prison housing to which a federal prisoner is otherwise subject, as it involves some degree of isolation.

Jackson's stays in SHUs are generally short, normally lasting less than a week, although his longest single stay in a SHU was one month. He tells you that, at every prison where he has spent time, federal Bureau of Prisons (BoP) personnel consistently deny him reading materials and exercise time when he is in a SHU, and in so doing violate BoP policy that guarantees such materials and such time to "all prisoners." He also tells you that he has never received a hearing before being placed in a SHU, despite BoP regulations requiring such a hearing. Federal law prohibits a prisoner in Jackson's situation from receiving compensation for BoP violations of this type. Indeed, Jackson tells you that all he wants is an injunction requiring BoP personnel to follow the law when they confine him to a SHU.

Jackson has just arrived two days earlier at the prison where you are speaking with him, the fifth one in which he has spent time. He has not spent time in a SHU at his new location.

Why might the BoP argue that Jackson's claims are moot? Based on Jackson's statements, what counter-arguments could you make?

Chapter 2: The Distribution of National Regulatory Powers

B. Presidential Immunity from Judicial Process

***Insert at page 153, before Part C*:**

Note: Immunity from Indictment

Perhaps the most serious instance of presidential amenability to judicial process would be the commencement of a criminal prosecution of the President while he was still in office. Would such a prosecution violate any constitutional principle that impeachment is the sole means of calling the President, or any senior federal official, to account for wrongdoing? Is the President different from any other federal official, such as a federal judge or even the Vice President, because of the uniqueness of the office the President of the United States? In 1973 and again in 2000, the White House Office of Legal Counsel (OLC) analyzed these difficult questions.

MEMORANDUM Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office.

Office of Legal Counsel
September 24, 1973

The question whether a civil officer of the federal government can be the subject of criminal proceedings while he is still in office has been debated ever since the earliest days of the Republic. This inquiry raises the following separate although to some extent interrelated issues. First, whether the constitutional provisions governing impeachment, viewed in general terms, prohibit the institution of federal criminal proceedings prior to the exhaustion of the impeachment process. Second, if the first question is answered in the negative, whether and to what extent the President as head of the Executive branch of the Government is amenable to the jurisdiction of the federal courts as a potential criminal defendant. Third, if it be determined that the President is immune from criminal prosecution because of the special nature of his office, whether and to what extent such immunity is shared by the Vice President.

I.
Must the Impeachment Process be Completed Before Criminal Proceedings May be Instituted Against a Person Who is Liable to Impeachment?

A. Textual and Historical Support for Proposition that Impeachment Need Not Precede Indictment.

1. Views of early commentators. Article II, section 4 of the Constitution provides:

> "The President, the Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high crimes and Misdemeanors."

Article I, section 3, clause 7 provides:

> "Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

The suggestion has been made that Article I, section 3, clause 7 prohibits the institution of criminal proceedings against a person subject to impeachment prior to the termination of impeachment proceedings. Support for this argument has been sought in Alexander Hamilton's description of the pertinent constitutional provision in the Federalist Nos. 65, 69 and 77, which explain that after removal by way of impeachment the offender is still liable to criminal prosecution in the ordinary course of law.

Article I, section 3, clause 7, however, does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term "nevertheless." The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument.

A speech made by Luther Martin—who had been a member of the Constitutional Convention--during the impeachment proceedings of Justice Chase shows that Article I, section 3, clause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings. . . .

2. Interpretations of the impeachment clause by official bodies. The practical interpretation of the Constitution has been to the same effect. During the life of the Republic impeachment proceedings have been instituted only against 12 officers of the United States. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached. . . .

There have been several instances of legislative actions envisaging the criminal prosecution of persons while still in office, and of the actual institution of criminal proceedings against federal officers while in office.

i. Section 21 of the Act of April 30, 1790, 1 Stat. 117, provided that a judge convicted of having accepted a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States." The disqualification provision of this section thus indicates that Congress anticipated criminal trials for bribery--an impeachable offense--prior to a judgment of the Senate providing for the removal and disqualification of the offender. It should be remembered that this statute was enacted by the First Congress many members of which had been members of the Constitutional Convention. Obviously they, and President Washington who approved the legislation, did not feel that it violated the Constitution. The disqualification clause is now a part of the general bribery statute and applies to every officer of the United States.

ii. In 1796, Attorney General Lee advised the House of Representatives that if a judge is convicted of a serious crime his "removal from office may and ought to be a part of the punishment.". . . The House Committee, to which the matter had been referred, concurred in that recommendation. Here again it was felt at that early stage of our constitutional life that, at least in regard to judges, impeachment did not have to precede the institution of criminal proceedings. Hence, Congress could provide for removal of a judge for bad behavior, evidenced by a criminal conviction, although it has not done so, except in the instance of a bribery conviction.

iii. Circuit Judge Davis retired in 1939 under the provisions of what is now 28 U.S.C. 371(b). In 1941 he was indicted for obstructing justice and tried twice. In both cases the jury was unable to agree and the indictment was ultimately dismissed. Only then did the Attorney General request Congress to impeach Judge Davis. The latter thereupon resigned from office waiving all retirement and pension rights. This in effect mooted the need for impeachment, but arguably not the power of impeachment.

iv. Judge Albert W. Johnson was investigated by a grand jury and testified before it prior to his resignation from office.

v. The Department of Justice concluded in 1970 on the strength of precedents ## i and ii, supra, that criminal proceedings could be instituted against a sitting Justice of the Supreme Court. . . .

In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings. The caveat is that all of the above instances concerned judges, who possess tenure under Article III only during “good behavior,” a provision not relevant to other officers. However,

although this clause may be the basis for a congressional power to remove judges by processes other than impeachment, it is not directly responsive to the question whether impeachment must precede criminal indictment, nor was the clause the basis for the actions in the historic instances noted above.

B. Troublesome Implications of a Proposition that Impeachment Must Precede Indictment.

The opposite conclusion, viz., that a person who is subject to impeachment is not subject to criminal prosecution prior to the termination of the impeachment proceedings would create serious practical difficulties in the administration of the criminal law. As shall be documented, infra, every criminal investigation and prosecution of persons employed by the United States would give rise to complex preliminary questions. These include, first, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and second, whether the offense is one for which he could be impeached. Third, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings. An interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one. Indeed, impractical or self-defeating interpretations of constitutional texts must be avoided. The Framers were experienced and practical men. This fact, coupled with the purposive spirit of constitutional interpretation set by Chief Justice Marshall, has been the foundation for the endurance of our constitutional system for 186 years.

[The memo then considered these three issues in detail.]

In sum, an interpretation of the Constitution which requires the completion of impeachment proceedings before a criminal prosecution can be instituted would enable persons who are or were employed by the Government to raise a number of extremely technical and complex defenses. It also would pressure Congress to conduct a large number of impeachment proceedings which would weigh heavily on its limited time. Such an interpretation of the Constitution is prima facie erroneous.

II.

Is the President Amenable to Criminal Proceedings while In Office?

This part of the memorandum deals with the question whether and to what extent the President is immune from criminal prosecution while he is in office. It has been suggested in the preceding part that Article I, sec, 3, clause 7 of the Constitution does not require the exhaustion of the impeachment process before an officer of the United States can be subjected to criminal proceedings. The question therefore arises whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch.

It has been indicated above that there is no express provision in the Constitution which confers such immunity upon the President. Inasmuch as Article I, sec. 6, clause 1 expressly provides for a limited immunity of the members of the legislative branch, it could be argued that, e contrario, the President is not entitled to any immunity at all. This proposition, however, is not necessarily conclusive; it could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary.

Further, as indicated by statements of Alexander Hamilton in The Federalist, No. 69,[13] it could be said that the immunity of the President to criminal indictment and trial during his office may have been too well accepted

[13] The Federalist, No. 69:

to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President.

Hamilton's comments were made in the context of calming fears about Executive power and distinguishing the President from the English king. Regarding criminal liability, his strongest statement would have been, to suggest that the President was subject to criminal liability before or after impeachment, yet on the occasion when he made the comparison he spoke only of criminal liability after impeachment. To be sure, there are strong statements by others to the point that the Convention did not wish to confer privileges on the President, but these were made in most general terms, end did not refer to the question now in issue.[14] Further, despite these statements an early Congress did recognize one form of privilege in the Executive in at least one instance.[15] The historical evidence on the precise point is not conclusive.

A. Ambiguities in a Doctrinal Separation of Powers Argument.

Any argument based on the position or independence of one of the three branches of the Government is subject to the qualification that the Constitution is not based on a theory of an airtight separation of powers, but rather on a system of checks and balances, or of blending the three powers. The Federalist, Nos. 47, 48 (James Madison). We must therefore proceed case-by-case and look to underlying purposes. This facet of any reasoning based on the doctrine of the separation of powers is necessarily stressed by those who oppose independence or immunity in a given instance. Examples include two dissenting opinions of Mr. Justice Holmes.

In Springer v. Philippine Islands, 277 U.S. 189 (1928), he gave graphic expression to the extent which the blending element in the Constitution has blunted the principle of the separation of powers:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. * * * When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on."

And again in Myers v. United States, 272 U.S. 52 (1926), he warns that any legal arguments drawn merely from the Executive power of the President, his duties to appoint officers of the United States and to commission them, and to take care that the laws be carefully executed seem to him "spider's webs inadequate to control dominant facts."

"The President [unlike the King] would be liable to be impeached, tried, and upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."

See also the following from Hamilton, The Federalist, No. 65:

"The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to perpetual ostracism * * *; he will still be liable to prosecution and punishment in the ordinary course of law."

The Federalist, No. 77:

"The President is at all times liable to impeachment, trial, dismission [*sic*] from office * * * and to the forfeiture of life and estate by subsequent prosecution in the common course of law."

[14] The Framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England. . . .

[15] See, e.g., President Washington's refusal in 1794 to submit to the Senate those parts of a diplomatic correspondence which in his "judgment for public considerations, ought not to be communicated." 1 Richardson, Messages and Papers of the Presidents 152. See Attorney General Randolph's note to President Washington that the message "appears to have given general satisfaction, Mr. M--d--n, in particular thinks it will have good effect." The Writings of George Washington (Bicentennial Edition) Vol. 33 p. 282 fn 8.

Whether or not one agrees with Holmes or the full thrust of his rhetoric, most scholars would concede that there are few areas under the Constitution to which a single branch of the Government can claim a monopoly. An argument based on the separation of powers must be illuminated therefore by constitutional practice.

The difficulty of developing clear rules regarding the various possible facets of Presidential immunity is demonstrated by the limited and ambivalent case law developed in the fields of the amenability vel non of the President to civil litigation and to the judicial subpoena power. . . .

In the Burr treason trial. Chief Justice Marshall at first concluded that since the President is the first magistrate of the United States, and not a King who can do no wrong, he was subject to the judicial subpoena power. United States v. Burr, 25 Fed. Cas. 30(C.C.D. Va., 1807) [Note *supra* this Chapter]. In the Burr misdemeanor trial, however, which took place only a few months later, the Chief Justice had to qualify significantly his claim of the subpoena power over the President by conceding that the courts are not required

> "to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187 (C.C.D. Va., 1807).

And by acquiescing in the privileges claimed by President Jefferson of not attending court in person and of withholding certain evidence for reasons of State, Chief Justice Marshall recognized that the power of the judiciary to subpoena the President is subject to limitations based on the needs of the Presidential office.

Marshall's recognition of the special character of the Presidential office was expanded in Kendall v. United States ex rel. Stokes, 12 Pet. 524 (1838), where the Court seemed to deny that it had any jurisdiction over the President;

> "The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeachment."

It is significant that this apparent total disclaimer of any judicial authority over the President also was qualified by adding the clause "so far as his powers are derived from the constitution."

There have been countless examples in which courts have assumed jurisdiction to scrutinize the validity of Presidential action, such as proclamations, Executive orders,[17] and even direct instructions by the President to his subordinates.[18] It is true that, as a matter of convention the party asserting the validity of the Presidential action (whether plaintiff or defendant) is usually a party other than the President, such as his subordinate, or the custodian of the res. Nevertheless there have been recent dicta that when this convention is inadequate to protect the citizen, i.e., where the President alone can give the requested relief, the courts may assume jurisdiction over the litigation.

Again, Attorney General Stanbery's famous oral argument in Mississippi v. Johnson, 4 Wall. 475 (1867), . . . is prefaced by the statement that the case made against President Johnson "is not made against him as an individual, as a natural person, for any acts he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States." Hence, Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President, and does not pertain to the question whether or not the courts lack the authority to deal with the President "the man" with respect to matters which have no relation to his official responsibility.

Thus it appears that under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.

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[17] See, e.g., United States v. Curtiss-Wright, 299 U.S. 304(1936) (Embargo Proclamation); United States v. Bush, 310 U.S. 371 (1940) (Customs Proclamation).

[18] Youngstown Sheet & Tube Co. v. Sawyer, (1952) (Steel Seizure) [*Supra* this Chapter].

B. Competing Interests.

An assessment designed to determine the extent to which the status of the Presidency is inconsistent with giving the courts plenary criminal jurisdiction over the President may be divided into two parts. First, the applicability vel non to the Presidency of any of the considerations which in Part I of this memorandum led to rejection of the proposition that impeachment must precede criminal proceedings, and, second, whether criminal proceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status.

1. Is court trial of a President too political for the judicial process? Part I of this memorandum, for a variety of reasons, concluded that the considerations which led to the establishment of the congressional impeachment jurisdiction, e.g., that the courts were not well equipped to handle (a) political offenses and (b) crimes committed by high office-holders, were insufficient to exempt every officer of the United States from criminal prosecution for statutory offenses prior to the termination of the impeachment proceedings. The question to be examined here is whether these reasons are so much stronger in the case of the President as to preclude his prosecution while in office.

a. Political offenses. Political offenses subject to indictment are either statutory or nonstatutory offenses. The courts, of course, cannot adjudicate nonstatutory offenses. With respect to statutory political offenses their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury, and there appear to be no weighty reason to differentiate between the President and other officeholder, unless special separation of powers based interests can be articulated with clarity.

It should be noted that it has been well established in civil matters that the courts lack jurisdiction to reexamine the exercise of discretion by an officer of the Executive branch. Marbury v. Madison, 1 Cranch (1803) [*Supra* Chapter 1]. By the same token it would appear that the courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President's discretion. This conclusion, of course, would involve a lack of jurisdiction over the subject matter and not over the person.

b. Intrinsically political figures. The second reason for the institution of impeachment, viz., the trial of political men, presents more difficulties. The considerations here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type.

i. The consideration that the ordinary courts of law are unable to cope with powerful men arose in England where it presumably was valid in feudal time. In the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned.

ii. We also note Alexander Hamilton's point that in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial. In Part I we assumed without discussion that this point was not of sufficient importance to require impeachment prior to indictment with respect to every officeholder. Undoubtedly, the consideration of assuring a fair criminal trial for a President while in office would be extremely difficult. It might be impossible to impanel a neutral jury. To be sure there is a serious "fairness" problem whether the criminal trial precedes or follows impeachment. However, the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure.

2. Would criminal proceedings against a President be ineffective and inappropriate because of his powers regarding (a) prosecution, (b) Executive privilege, and (c) pardons? The Presidency, however, creates a special situation in view of the control of all criminal proceedings by the Attorney General who serves at the pleasure and normally subject to the direction of the President and the pardoning power vested in the President. Hence, it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time. This objection would lose some of its persuasiveness where, as in the Watergate case, the President delegates his prosecutorial functions to the Attorney General, who in

turn delegates them to a Special Prosecutor. However, none of these delegations is, or legally can be, absolute or irrevocable.

Further, the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case. If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege. And even if all other hurdles are surmounted, he would still possess the pardoning power.

3. Would criminal proceedings unduly interfere in a direct or formal sense with the conduct of the Presidency?

a. Personal attendance. It has been indicated above that in the Burr case, President Jefferson claimed the privilege of not having to attend court in person. And it is generally recognized that high government officials are exempted from the duty to attend court in person in order to testify. This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter. . . .

b. Direct interference with official duties. A necessity to defend a criminal trial and to attend court in connection with it, however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process. The Constitutional Convention was aware of this problem but rejected a proposal that the President should be suspended upon impeachment by the House until acquitted by the Senate.

During the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution. This might constitute an incapacitation so that under the provisions of the Twenty-fifth Amendment, Sections 3 or 4, the Vice President becomes Acting President. The same would be true, if a conviction on a criminal charge would result in incarceration. However, under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.

This would suggest strongly that, in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation. [The non-physical yet practical interferences, in terms of capacity to govern, are discussed infra as the "fourth question."] The physical interference consideration, of course, would not be quite as serious regarding minor offenses leading to a short trial and a fine. It has been shown . . . that Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses. However, in more serious matters, i.e., those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal.

A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office. From the standpoint of minimizing direct interruption of official duties--and setting aside the question of the power to govern--this procedure might be a course to be considered. One consideration would be that this procedure would stop the running of the statute of limitations. . . . While this approach may have a claim to be considered as a solution to the problem from a legalistic point of view, it would overlook the political realities. As will be shown presently, an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction. To be sure, there could also be damage flowing from unrefuted charges. . . .

4. Would initiation or prosecution of criminal proceedings, as a practical matter, unduly impede the power to govern, and also be inappropriate, prior to impeachment, because of the symbolic significance of the Presidency? In Mississippi v. Johnson, supra, Attorney General Stanbery made the following statement:

> "It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President."

This may be an overstatement, but surely it contains a kernel of truth, namely that the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. It is not to be forgotten that the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries. The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Perhaps this thought is best tested by considering what would flow from the reverse conclusion, i.e., an attempted criminal trial of the President. A President after all is selected in a highly complex nationwide effort that involves most of the major socio-economic and political forces of our whole society. Would it not be incongruous to bring him down, before the Congress has acted, by a jury of twelve, selected by chance "off the street" as Holmes put it? Surely the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the "defendant."

The genius of the jury trial has been that it provides a forum of ordinary people to pass on matters generally within the experience or contemplation of ordinary, everyday life. Would it be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive?

In broader context we must consider also the problems of fairness, and of acceptability of the verdict. Given the passions and exposure that surround the most important office in the world, the American Presidency, would the country in general have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million? If based on "some" evidence it is unlikely a guilty verdict would be reversible on appeal (assuming no procedural error), and yet it could be tantamount to removal and probably would force a resignation. Even if there were an acquittal, would it be generally accepted and leave the President with effective power to govern?

A President who would face jury trial rather than resign could be expected to persist to the point of appealing an adverse verdict. The process could then drag out for months. By contrast the authorized process of impeachment is well-adapted to achieving a relatively speedy and final resolution by a nation-based Senate trial. The whole country is represented at the trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.

To be sure it is arguable that despite the foregoing analysis it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rests. Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

A counter-argument which could be made is that the indictment alone should force a resignation, thus avoiding the trauma either of a trial during office, or an impeachment proceeding. This counter-argument, however, rests on a prediction concerning Presidential response which has no empirical foundation. The reasons underlying the Founding Fathers' decision to reject the notion that a majority of the House of Representatives could suspend the President by impeaching him apply with equal force in a scheme that would permit a majority of a grand jury to force the resignation of a President. The resultant disturbance to our constitutional system would be equally enormous. Indeed, it would be more injudicious because the grand jury, a secret body, could interrupt Presidential succession without affording the incumbent the opportunity for a hearing to voice his defense.

A further factor relevant here is the President's role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. . . . Because only the

President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.

In suggesting that an impeachment proceeding is the only appropriate way to deal with a President while in office, we realize that there are certain drawbacks, such as the running of a statute of limitations while the President is in office, thus preventing any trial for such offenses. In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability. We doubt, however, that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office.

[The memo then continued to consider whether the Vice President is amenable to criminal proceedings while in office. It concluded that unlike the President, the Vice President is amenable to such proceedings.]

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Note: The 2000 Update

In 2000, the same office (OLC) issued a new memo addressing the same question the 1973 memo considered. That memo came to the same conclusion as the earlier one with regard to the question of presidential immunity to indictment while in office. However, it took account of cases that the Supreme Court had decided since 1973: *Nixon v. United States* (1974) (*Supra* this Chapter); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (Note *supra* this Chapter); and *Clinton v. Jones* (1997) (*Supra* this Chapter). The 2000 memo concluded that "these precedents are largely consistent with the Department's 1973 determinations that (l) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office." The memo continued:

> Indeed, *United States v. Nixon* and *Nixon v. Fitzgerald* recognized and embraced the same type of constitutional balancing test anticipated in this Office's 1973 memorandum. *Clinton v. Jones*, which held that the President is not immune from at least certain judicial proceedings while in office, even if those proceedings may prove somewhat burdensome, does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried.

The memo harmonized its conclusion with the Court's ruling against presidential immunity in *Clinton* by stressing the difference between civil and criminal cases, in terms of the effects of such litigation on the President's time and energy and thus ability to fulfill the functions of the presidency, the stigma of a criminal prosecution and that stigma's potential to impair effective presidential functioning, and the impossibility of such effective functioning if the criminal prosecution resulted in criminal confinement while the President still occupied the office. Echoing the 1973 memo, the 2000 memo continued:

> It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous,

> however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.

Addressing a familiar concern with such an immunity, the memo observed:

> Finally, recognizing a temporary immunity would not subvert the important interest in maintaining the "rule of law." To be sure, as the Court has emphasized, "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196 (1882). Moreover, the complainant here is the Government seeking to redress an alleged crime against the public rather than a private person seeking compensation for a personal wrong, and the Court suggested in *Nixon v. Fitzgerald* that "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." However, unlike the immunities claimed in both *Nixon* cases, the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial.

Do you agree with the analyses in these memos? What about the "balancing" methodology the 2000 memo discerns in both the earlier memo and the subsequent cases? Consider the likelihood that delay—in this case, the delay of a criminal prosecution until the President leaves office or is removed—normally helps defendants (since the prosecution has the burden of proof and thus might be handicapped by the passage of time). Does the unique nature of the office of the President necessarily mean that the holder of that office enjoys an especially powerful immunity from criminal prosecution, given that under the OLC's analysis any such prosecution might be delayed for months or even years? Does that mean he's effectively "above the law"?

C. Congress, the President, and the Administrative State

1. Limits on Congressional Authority to Delegate Legislative Power

***Insert at page 164, before Section 2*:**

Cases such as *Whitman*, featuring a broad consensus among the justices in favor of very relaxed non-delegation review, led many commentators to conclude that the non-delegation doctrine had all-but died by the early 21st century. In 2019, however, a sizable minority of the Court suggested that more stringent review of congressional delegations might be appropriate.

Gundy v. United States
139 S.Ct. 2116 (2019)

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under § 20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. . . . SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. *Reynolds v. United States*, 565 U.S. 432 (2012). The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." § 20901. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years.

The basic registration scheme works as follows. A "sex offender" . . . must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism).

Section 20913—the disputed provision here—elaborates the "[i]nitial registration" requirements for sex offenders. Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were "lost" to the system). And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration." . . .

Petitioner Herman Gundy is a pre-Act offender. . . . After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register . . . . He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari. Today, we join the consensus and affirm.

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). But the Constitution does not "deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States* (1944) [*Supra.* this Chapter]. Congress may "obtain[ ] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta v. United States*, 488 U.S. 361 (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Ibid.* So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) [Note *supra.* this Chapter]).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. See, *e.g., Whitman v. American Trucking Assns., Inc.* (2001) [*Supra.* this Chapter] (construing the text of a delegation to place constitutionally adequate "limits on the EPA's discretion"). Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." If that were so, we would face a nondelegation question. But it is not. This Court has already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. See *Reynolds*. And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds.

A

This is not the first time this Court has had to interpret § 20913(d). In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.

Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders. The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the

'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that *includes* offenders who committed their offenses before the Act became law." That purpose, the majority further noted, informed SORNA's "broad[ ]" definition of "sex offender," which "include[s] any 'individual who *was* convicted of a sex offense.' " *Id*. And those two provisions were at one with "[t]he Act's history." Quoting statements from both the House and the Senate about the sex offenders then "lost" to the system, *Reynolds* explained that the Act's "supporters placed considerable importance upon the registration of pre-Act offenders.". . .

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? The majority had a simple answer: "*[I]nstantaneous* registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." *Id*. . . . And attached to that broad feasibility concern was a more technical one. Recall that under SORNA "a sex offender must initially register before completing his 'sentence of imprisonment.'" But many pre-Act offenders were already out of prison, so could not comply with that requirement. That inability raised questions about "how[ ] the new registration requirements applied to them." "Congress['s] solution" to both those difficulties was the same: Congress "[a]sk[ed] the Department of Justice, charged with responsibility for implementation, to examine [the issues] and to apply the new registration requirements accordingly."

On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[ ] implementation delay." But no more than that. . . . Reasonably read, SORNA enabled the Attorney General only to address (as appropriate) the "practical problems" involving pre-Act offenders before requiring them to register. The delegation was a stopgap, and nothing more. . . .

C

Now that we have determined what § 20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. *J. W. Hampton*. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." Those standards, the Court has made clear, are not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman*. Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion .[S]ee *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (Both Note *supra.* this Chapter]. By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." See, *e.g., New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932). We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. *Yakus*. We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." *Whitman*. And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. Those issues arose, as *Reynolds* explained, from the need to "newly register[ ] or reregister[ ] a large number of pre-Act offenders" not then in the system. And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. See *Reynolds*. Even for those limited matters, the Act informed the Attorney General that he did not have forever to work things out. By stating its demand for a "comprehensive" registration system and by defining the "sex offenders" required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. Or again, in the words of *Reynolds*, that he could prevent "*instantaneous* registration" and impose some "implementation delay." That statutory authority, as compared to the delegations we have upheld in the past, is

distinctly small-bore. It falls well within constitutional bounds.

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*. Or as the dissent in that case agreed: "[S]ome judgments ... must be left to the officers executing the law." *Mistretta* (opinion of Scalia, J.); see *Whitman* ("[A] certain degree of discretion[ ] inheres in most executive" action). Among the judgments often left to executive officials are ones involving feasibility. In fact, standards of that kind are ubiquitous in the U.S. Code. See, *e.g.*, 12 U.S.C. § 1701z–2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction[ ] under [HUD] programs"); 47 U.S.C. § 903(d)(1) (providing that "the Secretary of Commerce shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible" in "assigning frequencies for mobile radio services"). In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA.

It is wisdom and humility alike that this Court has always upheld such "necessities of government." *Mistretta* (Scalia, J., dissenting); see *ibid.* ("Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law"). We therefore affirm the judgment of the Court of Appeals.

Justice KAVANAUGH took no part in the consideration or decision of this case.

Justice ALITO, concurring in the judgment.

The Constitution confers on Congress certain "legislative [p]owers," Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman*. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *ibid*.

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

Justice GORSUCH, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses *after* Congress adopted the Sex Offender Registration and Notification Act (SORNA) in 2006, the statute offers detailed instructions. It requires them "to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." The law divides offenders into three tiers based on the seriousness of their crimes: Some must register for 15 years, others for 25 years, and still others for life. The statute proceeds to set registration deadlines: Offenders sentenced to prison must register before they're released, while others must register within three business days after sentencing. The statute explains when and how offenders must update their registrations. And the statute specifies particular penalties for failing to comply with its commands. On and on the statute goes for more than 20 pages of the U.S. Code.

But what about those convicted of sex offenses *before* the Act's adoption? At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states." Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes. So Congress simply passed the problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U.S.C. § 20913(d):

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."

Yes, that's it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register." For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases. And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations." Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

Unsurprisingly, different Attorneys General have exercised their discretion in different ways. . . . These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently.

II

A

Our founding document begins by declaring that "We the People . . . ordain and establish this Constitution." At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private

persons—the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,"[17] or the power to "prescribe general rules for the government of society."

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative."[20]

Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty.[22] An "excess of law-making" was, in their words, one of "the diseases to which our governments are most liable."[23] To address that tendency, the framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto. Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.

Nor was the point only to limit the government's capacity to restrict the people's freedoms. Article I's detailed processes for new laws were also designed to promote deliberation. "The oftener the measure is brought under examination," Hamilton explained, "the greater the diversity in the situations of those who are to examine it," and "the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."[24]

Other purposes animated the framers' design as well. Because men are not angels[25] and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people's representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation. Indeed, some even thought a Bill of Rights would prove unnecessary in light of the Constitution's design; in their view, sound structures forcing "[a]mbition [to] . . . counteract ambition" would do more than written promises to guard unpopular minorities from the tyranny of the majority.[26] Restricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules.[27] And by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire

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[17] The *Federalist No. 78* (A. Hamilton).

[20] *Wayman v. Southard*.

[22] The *Federalist No. 48*, at 309–312 (J. Madison).

[23] *Id.*, No. 62. See also *id.*, *No. 73* (Hamilton); Locke, *Second Treatise* § 143.

[24] The *Federalist No. 73*.

[25] *Id.*, *No. 51* (Madison).

[26] The Federalist *No. 51*. See also *id.*, *No. 84* (Hamilton).

[27] *Id.*, *No. 62*.

structure of the Constitution," would "make no sense."[29] Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.[30] Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to "'disguise . . . responsibility for . . . the decisions.'"[31]

The framers warned us against permitting consequences like these. As Madison explained, "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'"[32] The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. Besides, enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of "fortitude ... to do [our] duty as faithful guardians of the Constitution."[33]

B

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test? Madison acknowledged that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."[34] Chief Justice Marshall agreed that policing the separation of powers "is a subject of delicate and difficult inquiry."[35] Still, the framers took this responsibility seriously and offered us important guiding principles.

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." In *Wayman* v. *Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions." Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details." The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual

[29] Lawson, "Delegation and Original Meaning," 88 *Va. L. Rev.* 327 (2002).

[30] The *Federalist No. 47* (Madison); *id., No. 62* (same).

[31] Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," 90 *N.Y.U. L. Rev.* 1463 (2015). See also B. Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* 87 (2012).

[32] The *Federalist No. 47*, at 302 (Madison). Accord, 1 Blackstone, *Commentaries on the Laws of England*, at 142; see also Cass, "Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State," 40 *Harv. J. L. & Pub. Pol'y* 147 (2016).

[33] The *Federalist No. 78*.

[34] *Id., No. 37* (Madison).

[35] *Wayman v. Southard*.

authority to make "alterations and additions" did no more than permit courts to fill up the details.

Later cases built on Chief Justice Marshall's understanding. . . . Through all these cases, small or large, runs the theme that Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed.[39]

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Here, too, the power extended to the executive may prove highly consequential. During the Napoleonic Wars, for example, Britain and France each tried to block the United States from trading with the other. Congress responded with a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country. In *Cargo of Brig Aurora* v. *United States*, this Court explained that it could "see no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo] either expressly or *conditionally*, as their judgment should direct."[40] Half a century later, Congress likewise made the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that the bridge wouldn't interfere with navigation of the East River. The Court held that Congress "did not abdicate any of its authority" but "simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact."[41]

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.[42] So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if "the discretion is to be exercised over matters already within the scope of executive power."[43] Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."

C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court responded by striking down statutes for violating the separation of powers.

In *Schechter Poultry*, the Court considered a statute that transferred to the President the power "to approve 'codes of fair competition'" for slaughterhouses and other industries. But Congress offered no meaningful guidance. It did not, for example, reference any pre-existing common law of fair competition that might have supplied guidance on the policy questions, as it arguably had done earlier with the Sherman [Antitrust] Act. And it did not announce rules contingent on executive fact-finding. Nor was this assigned power one that anyone thought might inhere in the executive power. Proceeding without the need to convince a majority of legislators, the President adopted a lengthy fair competition code written by a group of (possibly self-serving) New York poultry butchers.

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[39] *Yakus v. United States*.

[40] 11 U.S. (7 Cranch) 382 (1813) (emphasis added).

[41] *Miller v. Mayor of New York*, 109 U.S. 385 (1883).

[42] See *Youngstown Sheet & Tube Co. v. Sawyer* (1952) (Jackson, J., concurring) [*Supra.* this Chapter].

[43] Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?" 83 *Mich. L. Rev.* 1223 (1985).

Included in the code was a rule that often made it a federal crime for butchers to allow customers to select which individual chickens they wished to buy. . . . After a trial in which the Schechters were found guilty of selling one allegedly "unfit" chicken and other miscellaneous counts, this Court agreed to hear the case and struck down the law as a violation of the separation of powers. If Congress could permit the President to write a new code of fair competition all his own, Justice Cardozo explained, then "anything that Congress may do within the limits of the commerce clause for the betterment of business [could] be done by the President . . . by calling it a code. This is delegation running riot."[48]

The same year, in *Panama Refining*, the Court struck down a statute that authorized the President to decide whether and how to prohibit the interstate transportation of "hot oil," petroleum produced or withdrawn from storage in excess of state-set quotas. As in *Schechter Poultry*, the law provided no notice to regulated parties about what the President might wind up prohibiting, leading the Court to observe that Congress "ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule." The Court explained that the statute did not call for the executive to "ascertai[n] the existence of facts to which legislation is directed." Nor did it ask the executive to "'fill up the details'" "within the framework of the policy which the legislature has sufficiently defined."[51] "If [the statute] were held valid," the Court continued, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."

After *Schechter Poultry* and *Panama Refining*, Congress responded by writing a second wave of New Deal legislation more "[c]arefully crafted" to avoid the kind of problems that sank these early statutes. And since that time the Court hasn't held another statute to violate the separation of powers in the same way. Of course, no one thinks that the Court's quiescence can be attributed to an unwavering new tradition of more scrupulously drawn statutes. Some lament that the real cause may have to do with a mistaken "case of death by association" because *Schechter Poultry* and *Panama Refining* happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions. But maybe the most likely explanation of all lies in the story of the evolving "intelligible principle" doctrine.

This Court first used that phrase in 1928 in *J. W. Hampton*, where it remarked that a statute "lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform" satisfies the separation of powers. No one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution. . . .

Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. . . . This mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on "misunderst[ood] historical foundations." They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. . . .

Still, the scope of the problem can be overstated. At least some of the results the Court has reached under the banner of the abused "intelligible principle" doctrine may be consistent with more traditional teachings. Some delegations have, at least arguably, implicated the president's inherent Article II authority. The Court has held, for example, that Congress may authorize the President to prescribe aggravating factors that permit a military court-martial to impose the death penalty on a member of the Armed Forces convicted of murder—a decision that may implicate in part the President's independent commander-in-chief authority.[64] Others of these cases may have involved laws that specified rules governing private conduct but conditioned the application of those rules on fact-finding—a practice that is, as we've seen, also long associated with the executive function.[65] . . .

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[48] *Schechter Poultry* (concurring opinion).

[51] *Panama Refining* (quoting *Wayman*).

[64] See *Loving v. United States*, 517 U.S. 748 (1996).

[65] See, *e.g.*, *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (statute directing Secretary of Transportation

III

A

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we've seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details." This much appears to have been deliberate, too. Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions for offenders who do not present an "imminent hazard to the public safety" comparable to that posed by newly released post-Act offenders. It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. . . .

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power.[85]

Our precedents confirm these conclusions. If allowing the President to draft a "cod[e] of fair competition" for slaughterhouses was "delegation running riot," then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible.[86] And if Congress may not give the President the discretion to ban or allow the interstate transportation of petroleum, then it's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time.[87] If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.

The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato

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to establish pipeline safety user fees "sufficient to meet the costs of [specified] activities" but not "exceed[ing] 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees").

[85] The *Federalist No. 78* (Hamilton); see also Part II–A, *supra*.

[86] *Schechter Poultry* (Cardozo, J., concurring).

[87] *Panama Refining.*

to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority. Nor could the Attorney General afford the issue the kind of deliberative care the framers designed a representative legislature to ensure. Perhaps that's part of the reason why the executive branch found itself rapidly adopting different positions across different administrations. And because SORNA vested lawmaking power in one person rather than many, it should be no surprise that, rather than few and stable, the edicts have proved frequent and shifting, with fair notice sacrificed in the process. Then, too, there is the question of accountability. In passing this statute, Congress was able to claim credit for "comprehensively" addressing the problem of the entire existing population of sex offenders (who can object to that?), while in fact leaving the Attorney General to sort it out.

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to "unit[e]" the "legislative and executive powers ... in the same person"—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.[88]

Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

B

What do the government and the plurality have to say about the constitutional concerns SORNA poses? Most everyone, the plurality included, concedes that if SORNA allows the Attorney General as much authority as we have outlined, it would present "a nondelegation question." So the only remaining available tactic is to try to make this big case "small-bore" by recasting the statute in a way that might satisfy any plausible separation-of-powers test. So . . . the government . . . invites us to reimagine SORNA as compelling the Attorney General to register pre-Act offenders "to the maximum extent feasible." And, as thus reinvented, the government insists, the statute supplies a clear statement of legislative policy, with only details for the Attorney General to clean up.

But even this new dream of a statute wouldn't be free from doubt. A statute directing an agency to regulate private conduct to the extent "feasible" can have many possible meanings: It might refer to "technological" feasibility, "economic" feasibility, "administrative" feasibility, or even "political" feasibility. Such an "evasive standard" could threaten the separation of powers if it effectively allowed the agency to make the "important policy choices" that belong to Congress while frustrating "meaningful judicial review." And that seems exactly the case here, where the Attorney General is left free to make all the important policy decisions and it is difficult to see what standard a court might later use to judge whether he exceeded the bounds of the authority given to him. . . .

Note: *Gundy* and the Future of the Non-Delegation Doctrine

1. The justices' disagreement in *Gundy* focused partly on whether SORNA could really be read as the plurality read it—that is, as specifying "feasibility" as a limitation on the Attorney General's discretion to impose registration and notification requirements on "pre-Act offenders."

[88] The *Federalist No. 47*.

By contrast, Justice Gorsuch read that provision as granting much more—indeed, essentially limitless—discretion to the Attorney General. The plurality conceded that, if that was the correct reading, "we would face a nondelegation question." Justice Gorsuch's unwillingness to accept the plurality's more limited reading of the discretion the statute gave the Attorney General is itself significant, as it might presage less willingness to avoid non-delegation challenges by the statutory interpretation method adopted by the *Gundy* plurality (as well as in *Whitman*).

2. Focus now on the more fundamental disagreement on the Court: whether the "intelligible principle" test should be tightened up. Consider Justice Gorsuch's proposed tests. How easy would it be for a court to determine whether a statute simply requires the executive to "fill in the details"? How does Justice Gorsuch distinguish between a "detail" that Congress can delegate and a policy choice that Congress has to make itself?

What about Justice Gorsuch's attempt to distinguish policy-making (which he argues Congress must perform) from mere fact-finding? Is that a workable test? Hypothesize a statute that authorizes the President to take significant actions to combat climate change if he "finds" as a "fact" that "climate change is a threat to human health." Would such a statute simply require the President to find a straightforward empirical fact as a predicate for taking the congressionally authorized action? Or would such a "fact-finding" reflect significant policy judgment? Or consider a real-life example: the statute in *J.W. Hampton* authorized the President to impose tariffs on imported goods in order to "equalize" the cost of producing that good abroad and in the United States. Is there really no policy judgment involved in that kind of "fact finding"?

Consider finally Justice Gorsuch's suggestion that congressional delegations of power may be constitutional if the recipient of the delegation already has independent constitutional authority over that matter. You've already encountered the idea that different branches share constitutional power over certain subjects, in Justice Jackson's concurring opinion in *Youngstown* (which Justice Gorsuch cites). But how much work can it do in actual cases?

3. Finally, consider the real-world implications of a stricter non-delegation doctrine. Justice Kagan suggested, perhaps hyperbolically, that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional." How easy would it be for Congress to write the sort of detailed statutes a stricter non-delegation doctrine would demand, if the matter in question (say, climate change or securities markets) is exceptionally complex and dynamic, requiring constant regulatory changes? But before you decide that such issues require Congress to give agencies significant policy-making authority, isn't Justice Gorsuch right that under our system it's Congress's job to make federal policy? This tension largely explains the justices' disagreement about the non-delegation doctrine.

4. Justice Kavanaugh had not yet taken his seat on the Court when *Gundy* was argued; thus, he did not participate in the case. Given Justice Aito's willingness to reconsider the doctrine if a majority agrees to do so, Justice Kavanaugh's position will be critical to whether a majority undertakes such a re-examination. At any rate, it is certainly the case that the possibility of convincing the Court to engage in that reconsideration will prompt litigators to bring more non-delegation challenges. The questions posed in this note won't go away anytime soon.

3. Executive Control Over the Bureaucracy

Insert at page 203 before the first note:

Note: Principal Officers, Inferior Officers, and Employees

1. Among other issues, *Morrison v. Olson* considered whether the officer in question was a "principal officer" or an "inferior" officer for purposes of Article II's Appointments Clause. But there's another category of federal personnel—plain old employees, such as letter carriers and the desk clerk at the local Social Security office. You may have a sense that such employees are likely not chosen by the President, as required for principal officers, or either the President, the "Courts of Law" or the "Heads of Departments," as Article II specifies for "inferior officers." Indeed, the Court has recognized that such persons are simply "employees" of the federal government. In 2018, the Supreme Court decided into which category fall "administrative law judges," such as the adjudicators at issue in *Commodities Futures Trading Corp. v. Schor* (1986) (*supra.* Chapter 1).

Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (2018), concerned the status of ALJs within the Securities and Exchange Commission (SEC). A financial advisor, Lucia, was charged with violating federal securities laws, and was found liable by an SEC ALJ. The SEC is understood to be a "department" for Article II purposes; however, SEC ALJ's are selected by SEC staff, not selected by the "heads" of that "department" (*i.e.*, the commissioners of the SEC). Lucia argued that the ALJ's selection by the agency's staff, rather than by the agency's heads, violated Article II because ALJs are "inferior officers." The government originally defended the ALJ's selection process on the ground that ALJs, like postal workers and clerks in government offices, are mere "employees" whose appointment is not limited by any constitutional provision. (The government eventually switched its position, and the Court appointed a private attorney to defend the constitutionality of the ALJ selection process.) Lower courts had disagreed on this question.

2. The Supreme Court, by a vote of 7-2, agreed with Lucia that ALJs are indeed inferior officers, rather than employees, and thus held that the ALJ that had adjudicated Lucia's claim had not been validly appointed. Writing for those justices, Justice Kagan relied heavily on two cases, *United States v. Germaine*, 99 U.S. 508 (1879) and, in particular, *Freytag v. Commissioner*, 501 U.S. 868 (1991). *Germaine* held that whether an official was an inferior officer rather than a mere employee turned on whether the official occupied "a continuing position established by law." The Court observed that both sides agreed that this criterion was satisfied, since federal law established the position of "administrative law judge" within the SEC.

Freytag applied a second criterion, announced in an earlier case, that asked whether the official in question exercised "significant authority pursuant to the laws of the United States." *Freytag*, which dealt with a type of administrative adjudicator unique to federal tax adjudications, concluded that the so-called "Special Trial Judges" ("STJs") at issue in that case were inferior officers. In addition to satisfying the *Germaine* requirement, *Freytag* held that STJ's exercised such "significant authority" because they (1) received evidence and examined witnesses, (2) conducted trials, (3) ruled on the admissibility of evidence, and (4) had the power to enforce compliance with discovery orders. The SEC ALJs at issue in *Lucia* possessed these same powers.

Justice Kagan concluded: "So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries."

3. Justice Thomas, joined by Justice Gorsuch, joined the Court's opinion. But he wrote separately to stress that in other cases not as obviously governed by *Freytag* the Court should consider the original meaning of the term "officer." Relying largely on a law review article, he argued that "[t]he Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty."

Justice Sotomayor, joined by Justice Ginsburg, dissented. She would have understood the "significant authority" test as requiring that the official in question have the authority to issue binding decisions on behalf of the federal government. Under federal securities law, decisions of SEC ALJ's are not formally binding until the agency's commissioners either grant review and affirm them or decline review, in which case they issue an order that makes the ALJ's decision final. Given this structure, Justice Sotomayor would have held that SEC ALJs lack the power she believed was necessary for them to be considered something more than a mere employee.

4. Justice Breyer concurred only in the judgment that SEC ALJs should have been appointed by the commissioners of the SEC, and not the agency's staff. But he would have rested his decision, not on any Article II definition of "inferior officer," but rather on the theory that the statute that created administrative law judges generally required their appointment by the heads of departments.

For our purposes, the most interesting part of his dissent flowed from his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010) (*Supra.* this Chapter). Recall that that case held that it was unconstitutional for the inferior officers at issue in that case to enjoy two levels of "good cause" insulation from presidential removal authority. Justice Breyer dissented in that case, worrying that the majority's decision could mean that ALJs, if held to be inferior officers, could not enjoy job protection (one layer of removal authority) if, as federal law prescribed, the persons responsible for removing them for cause (the Civil Service Board responsible for ALJs' job tenure) also enjoyed good-cause removal protection (the second level of removal authority).

Justice Breyer expressed concern about the prospect that ALJs, now considered Article II inferior officers, could not enjoy the removal protection that helped ensure their independence. He wrote that that would "risk transforming administrative law judges from independent adjudicators into dependent decisionmakers, serving at the pleasure of the [agency heads]." Given the importance of impartial adjudication, even within an agency, this prospect caused him great concern.

Note that Justice Breyer's concern in *Lucia* was not about *appointment* but instead *removal*. Nevertheless, because *Free Enterprise Fund* at least suggested that the Constitution prohibited inferior officers' double-insulation from *removal*, the inferior office status of ALJs as a matter of the *Appointments* Clause has implications for the removal question.

Note: Agency Leadership Structure and Agency Independence

In 2016, a federal Court of Appeals introduced a new element into analysis of the constitutionality of independent agencies—namely, whether the agency in question was headed by a single person or by a group such as the Commissioners of the Federal Communications Commission. The agency at issue in the case was the Consumer Financial Protection Bureau (CFPB), which Congress created in the aftermath of the Great Recession of 2008 to protect consumers from predatory financial practices.

In *PHH Corporation. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), a mortgage lender that was the subject of a CFPB enforcement action argued that the agency was unconstitutional because it was led by a single person who enjoyed for-cause removal protection—that is, a person who was not subject to removal at will by the President. Agreeing with that argument, the appellate panel acknowledged that the constitutional text did not answer the question. However, the court argued that historical practice militated against the constitutionality of the CFPB's structure, because there were very few examples of independent agencies led by one person, and because the few examples that existed were of relatively recent vintage. The opinion was written by Judge Brett Kavanaugh, who in July 2018 was selected to replace retiring Justice Anthony Kennedy on the Supreme Court.

The court did acknowledge that the Supreme Court upheld the independence of the Special Prosecutor's office in *Morrison v. Olson*. However, the appellate court stated that "*Morrison* did not expressly consider whether an independent agency could be headed by a single director." It also stated that "[t]he independent counsel . . . had only a limited jurisdiction for particular defined investigations." The court concluded this part of its analysis by stating that "in separation of powers cases not resolved by the constitutional text alone, historical practice matters a great deal in defining the constitutional limits on the Executive and Legislative branches."

The court then continued by stating that "[t]he historical practice of structuring independent agencies as multi-member commissions or boards is the historical practice for a reason: It reflects a deep and abiding concern for safeguarding the individual liberty protected by the Constitution." The court argued that an independent agency's multi-person leadership structure helped to mitigate the problem of an agency possessing coercive power while being unaccountable to the President. In particular, it observed that a multi-member structure helped ensure that the agency acted deliberatively rather than arbitrarily, and not in ways that unduly infringed on individuals' liberty. It also argued that a multi-member structure helped ensure that the agency was not unduly influenced (or "captured") by a single interest group, and observed that a dissenting opinion by one of the members of that agency leadership group could serve to warn Congress and the public of inappropriate agency action.

Having concluded that the CFPB's leadership by a single person immune from presidential removal at-will violated the Constitution, the court faced the question of a remedy. Rather than invalidate the agency entirely, the court concluded that the more prudent response would be to strike down the for-cause provision that immunized the agency head from at-will presidential

removal. Thus, in effect, the court ordered that the CFPB head become removable at will by the President.

One judge on the three-judge panel did not join the court's constitutional analysis, arguing that it was unnecessary to the resolution of the case before it. Moreover, in early 2017, the full Court of Appeals vacated this opinion and ordered review by the full *en banc* court. In January 2018 the full court rejected the panel's ruling, and upheld the CFPB's constitutionality. *PHH Corporation v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (*en banc*). However, several months later a district court in another circuit agreed with Judge Kavanaugh's result in the earlier iteration of the *PHH* case, and found the CFPB's structure unconstitutional. *CFPB v. RD Legal Funding*, 2018 WL 3094916 (SDNY June 21, 2018).

What do you think of the court's heavy focus on historical practice as an important factor in determining the constitutionality of the CFPB's structure? In a different case, dealing with a different alleged regulatory innovation, Chief Justice Roberts echoed the Court of Appeals' analysis, warning that "the most telling indication of [a] severe constitutional problem [with a statute] . . . is the lack of historical precedent for Congress's action." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Yet in the sentence before he issued that warning, he also acknowledged that "[l]egislative novelty is not necessarily fatal; there is a first time for everything." How should the unusual or innovative nature of a given regulatory structure affect the question of its constitutionality? Leaving that issue aside, what do you think of the court's policy analysis of the dangers of an independent agency headed by a single person, and the benefits of leadership by a multi-person group? Can you flip the court's analysis—that is, can you find *benefits* in having an independent agency being led by a single person? If so, are those benefits consistent with the theories of separation of powers that you've encountered up to now?

D. Foreign Affairs and the War Power

2. The War Power

c. The War Power in a World of Small Wars

***Insert at page 235, before the Note*:**

Note: From Libya to Syria (and Obama to Trump)

1. In April, 2018, the United States, along with the United Kingdom and France, launched a cruise missile attack against Syrian government facilities that were associated with that regime's alleged use of chemical weapons as part of that nation's civil war. The Office of Legal Counsel, the same White House office that issued the memorandum (excerpted in the casebook immediately before this note) that considered the legality of the Obama Administration's actions in Libya, presented President Trump with an analogous memo. *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 O.L.C. Op. ___ (2018).

2. The *Syrian* memo followed the Obama *Libya* memo relatively closely, although with some changes. Most notably, like the *Libya* memo it relied heavily on past practice rather than judicial precedent when attempting to delineate the President's Article II power to introduce American

armed forces into hostile situations. The *Syrian* memo used strong language when reaching a conclusion based on that past practice: "that history," the memo stated, "points strongly in one direction . . . [the President's] authority to direct U.S. forces in hostilities without prior congressional authorization is supported by a long continued practice on the part of the Executive, acquiesced in by the Congress." *Id.* at *5.

3. The *Syrian* memo also followed the *Libya* memo in conditioning presidential power on two issues: first, the President's identification of sufficiently important national interests justifying the introduction of U.S. forces, and second, "whether the 'anticipated nature, scope and duration' of the conflict might rise to the level of a war under the Constitution." *Id.* at *10 (quoting the *Libya* memo). Importantly, however, of the three national interests the *Syrian* memo cited, two of them ("the prevention of a worsening of the region's humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons," *id.* at *11) had never been mentioned before in a publicly-released OLC memo. (The first interest—"the promotion of regional stability," *ibid.*, had been mentioned in earlier memos, including the *Libya* memo). Interestingly, though, the humanitarian justification had been cited in an unpublished 2014 OLC opinion. Even the non-proliferation justification had been discussed in internal Obama Administration discussions, which also related to a possible strike on Syria. With regard to the second condition (the "nature, scope and duration" of the conflict), the *Syrian* memo had no difficulty concluding that a one-time cruise missile attack did not rise to the level of a war, as the Constitution uses that term.

4. What do you think of the justifications in the *Syrian* memo? Humanitarian crises arise all the time in the world, often as a result of a particular government's abusive treatment of its people. Should such crises justify the President taking unilateral military action? Of course, in the modern world such crises often impact global stability: just think of the migrant crises that have been roiling both Europe and the United States in recent years, which have been largely caused by humanitarian catastrophes in the migrants' home countries. Does the interconnected nature of the world today give the President a foreign policy-based justification for humanitarian intervention anytime he deems it necessary?

5. Consider also the second prong of the test set forth in both memos. The *Libya* memo explained that this prong was designed to avoid situations where "the difficulties of withdrawal and risk of escalation" created outcomes "in which Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed." In other words, this prong is designed to avoid a situation where the nation finds itself trapped in hostilities from which it can't extricate itself without further fighting, thus effectively making it impossible for Congress to have a say in whether to keep the fight going.

It's easy to see how a one-time cruise missile attack of the type contemplated by the *Syrian* memo is sufficiently discrete so as to satisfy this concern. The *Libya* memo considered a more ongoing campaign, but one that that memo stressed did not involve ground troops, which it observed would have made the above-noted difficulties and risks more likely. Do these memos mean that the President has free use of drones, the Air Force, cruise missiles, and anything else that doesn't involve close-in, face-to-face fighting? What about special operations (*e.g.*, the Navy

SEALS)? What about conventional ground soldiers sent to fight a regime that is so weak that it could be expected to collapse after just a few days of fighting?

Part II: The Division of Federal and State Regulatory Power

Chapter 4: Congress's Regulatory Powers

B. Federal Power to Regulate Interstate Commerce

3. The Evolution of Expanded Federal Power

***Insert at page 303, before Section 4*:**

Problem: The Federal Commerce Power—Then and Now

Tom Tyringham was arrested by federal authorities and charged with violating a federal statute that criminalized the possession of obscene material. Tom had set up a hidden tripod and camera in his bedroom and had taken photos of himself and his wife (without her knowledge) that would qualify as obscene, and thus would not enjoy any constitutional protection as free speech. Tom had no intention of distributing the material, or even showing it to anyone else (including his wife), nor has he ever purchased any obscene material in his lifetime.

You are an assistant U.S. Attorney for the district in which Tom was arrested. Your supervisor asks you to analyze whether it would be constitutional to apply the federal obscenity statute to Tom. What would you need to know about that statute to make that determination? How relevant would the particular facts about Tom be? Are there other facts about the case that you think might be relevant?

Return to this question after you read both *United States v. Lopez* (pages 303-319) and the note about *United States v. Morrison* (pages 319-320).

Return to this question again after you read *Gonzalez v. Raich* (pages 320-333).

How does your analysis change after each successive case?

Chapter 5: Residual State Powers—and Their Limits

A. The Commerce Clause as a Limitation on State Regulatory Power

3. Modern Applications

***Insert at the end of page 372*:**

Problem: Regulating Health Care Clinics

In the last decade, there has been rising interest among states in regulating health care clinics that offer sophisticated bone and organ imaging services. The machines that perform these services are very expensive, and there is concern that a proliferation of clinics offering them will cause destructive price competition that will lead to a decline in proper care, and that, as part of that competition, these businesses will seek to promote these services even when they are not medically appropriate.

The State of Franklin is one of these states. Last year it enacted a law that requires a license before a new clinic of this sort may be opened. That license will be granted only if the State Department of Health concludes that the community where the clinic is proposed to be located has a "demonstrated need" for such services—*e.g.*, if that community is underserved with regard to this technology. Clinics in operation when the law was enacted are not subject to this requirement.

Imaging Resources, Inc., is a corporation based in California that owns and operates a chain of such clinics. It wishes to expand into Franklin. Upon being denied licenses for those clinics, it sues the Franklin Department of Health, the agency responsible for licensing these clinics in Franklin. Imaging Resources alleges that the Franklin law violates the dormant Commerce Clause, as it discriminates against new entrants into the market for the benefit of existing clinics.

What facts would you want to know before you decide how you would analyze this case? Why would you want to know them?

4. The Limits of the Doctrine—And Critiques

Note: Critiques of Benefit-Burden "Balancing" and the Dormant Commerce Clause Generally

Insert at page 378, before the next Note:

3. In 2019, the justices again considered the fundamentals of the dormant Commerce Clause. In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449 (2019), the Court struck down, on dormant commerce grounds, a Tennessee law that imposed durational residency requirements on anyone who wished to operate a retail liquor establishment in the state. Writing for seven justices, Justice Alito offered the following defense of the dormant commerce principle:

> Th[e] 'negative' aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. This interpretation, generally known as "the dormant Commerce Clause," has a long and complicated history. Its roots go back as far as *Gibbons v. Ogden* (1824) [*supra.* this Chapter], where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had "great force." His successor disagreed, *see License Cases*, 46 U.S. (5 How.) 504 (1847) (Taney, C. J.), but by the latter half of the 19th century the dormant Commerce Clause was firmly established, and it played an important role in the economic history of our Nation.
>
> In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (THOMAS, J., dissenting) [Note *supra.* this Chapter]. But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.
>
> That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. . . . The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In The *Federalist No. 7*, Hamilton argued that state protectionism could lead to conflict among the States, and in No. 11, he touted the benefits of a free national market. In The *Federalist No. 42*, Madison sounded a similar theme.
>
> In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job. The only other provisions that the Framers might have thought would fill that role, at least in part, are the Import-Export Clause, Art. I, § 10, cl. 2, which generally prohibits a State from "lay[ing] any Imposts or Duties on Imports or Exports," and the Privileges and Immunities Clause, Art. IV, § 2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." But the Import-Export Clause was long ago held to refer only to international trade. And the Privileges and Immunities Clause has been interpreted not to protect corporations, and may not guard against certain discrimination scrutinized under the dormant Commerce Clause. So if we accept the Court's established interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism.

Justice Gorsuch, joined by Justice Thomas, questioned the Court's reliance on the dormant Commerce Clause, especially since the Twenty-first Amendment (which repealed Prohibition) gave states specific authority over regulating alcohol. But speaking more generally about the idea of using the Commerce Clause in its "negative" or "dormant" aspect, he wrote:

> [W]e are asked to decide whether Tennessee's residency requirement impermissibly discriminates against out-of-state residents and recent arrivals in violation of the "dormant Commerce Clause" doctrine. And that doctrine is a peculiar one. Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one. Under its banner, this Court has sometimes asserted the power to strike down state laws that discriminate against nonresidents on the ground that they usurp the authority to regulate interstate commerce that the Constitution assigns in Article I to Congress. But precisely because the Constitution assigns Congress the power to regulate interstate commerce,

that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents.

Chapter 6: Federal Regulation of the States

B. The Prohibition on "Commandeering"

***Insert at page 428, before Part C*:**

Note: Commandeering or Preemption?

1. Regardless of whether it is sound, the commandeering cases you just encountered seem conceptually simple enough: under that doctrine, Congress may not interfere with how states employ their sovereign legislative or law-enforcement power. But think about that rule for a moment: wouldn't many completely uncontroversial uses of Congress's power to preempt state laws constitute just such an (unconstitutional) interference? For example, what about a federal law that deregulated airline fares and prohibited states from imposing any such regulation. Wouldn't such a prohibition "commandeer" the states by dictating the subjects on which states may and may not legislate? The Court confronted this question in 2018, in *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461 (2018).

2. *Murphy* considered the constitutionality of a federal law entitled the Professional and Amateur Sports Protection Act (PAPSA). Congress enacted PAPSA in response to the growth of sports betting in the 1980's and early 1990's. Essentially, the law prohibited states from "authorizing" sports betting, except for carve-outs for the four states that allowed sports betting at the time of PAPSA's enactment; it also allowed New Jersey one year to allow sports betting in Atlantic City. Thus, with the time-and-place limited exception for New Jersey, PAPSA prohibited any state that already banned sports betting from repealing its ban.

As for New Jersey, the one-year period passed without that state deciding to allow sports betting in Atlantic City, but a number of years later the state reversed course and enacted a law allowing such betting. The NCAA (the organization that runs collegiate sports, and that opposes sports betting) sued the state, alleging that it had violated PAPSA. The state argued in response that PAPSA's restrictions—which now extended to sports betting in Atlantic City—commandeered the New Jersey legislature by prohibiting the legislature from deciding to repeal its statewide ban on sports betting.

3. The Court agreed with the state. Addressing the constitutional issue in an opinion that spoke for seven justices, Justice Alito repeated the rationales for the prohibition on commandeering that Justice O'Connor had offered in *New York v. United States* (1992) [*supra.* this Chapter]. He concluded that, under PAPSA, "state legislators are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." He then rejected, as "empty," the distinction the NCAA drew between federal laws that "told states what they must do," which would violate the commandeering rule, and laws that instead "told states . . . what they

must not do." He wrote: "It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."

But what about preemption? Don't federal laws preempting state laws "[tell] states what they must not do"—*i.e.*, they must not pass laws that conflict with the federal law in question? Not according to the Court. Justice Alito explained that garden-variety preemption works as follows: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."

But what about language in a federal law that operates on states? Justice Alito offered the example of The Airline Deregulation Act of 1978, which he described as lifting previously-existing regulations on airline rates. That law contained a preemption provision that read as follows: "no State or political subdivision thereof . . . shall enact or enforce any law . . . relating to rates, routes, or services of any [covered] air carrier." He explained why this type of law did not violate the commandeering prohibition as follows:

> "This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. . . . And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints. . . .
>
> In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.
>
> Once this is understood, it is clear that the PAPSA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. . . . Nor does it impose any federal restrictions on private actors. . . . Thus, there is simply no way to understand [this provision] as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow."

4. Justice Ginsburg, joined by Justice Sotomayor and in part by Justice Breyer, "assum[ed], *arguendo*," that this provision violated the commandeering prohibition. But she argued that the Court could have excised, or "severed," that provision of PAPSA rather than striking the entire statute down, as the Court did. Justice Breyer joined the majority's commandeering and preemption analysis, but he agreed with Justice Ginsburg on the severability ground. Justice Thomas joined the majority opinion but wrote separately to discuss the severability issue that occupied Justices Ginsburg and Breyer.

5. Leave aside the wisdom of the anti-commandeering rule. Are you persuaded by Justice Alito's attempt to distinguish (unconstitutional) commandeering of state governmental institutions from (perfectly constitutional) federal preemption of state laws? Note that Justice

Alito makes a great deal of the fact that the PAPSA provision at issue in *Murphy* did not regulate private actors. Instead, it simply regulated *how states regulated* would-be sports bettors. Does that really distinguish this example of commandeering from garden-variety federal preemption of a state law enacted by a state legislature?

C. Constitutional Limits on Judicial Remedies Against States

2. The *Young* Doctrine

***Insert at page 446, before the Note*:**

Note: Applying *Coeur d'Alene*

The Court's cryptic and fractured holding in *Coeur d'Alene* might make you wonder how the case has been applied in the lower courts. Most courts that have applied it have done so in factual contexts similar to that in *Coeur d'Alene* itself—that is, requests for injunctions against state officials involving disputes over control of land. *E.g.*, *W. Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004) (applying *Coeur d'Alene* in a case brought against several defendants, including the Governor of New York, alleging that the state was in wrongful possession of land that belonged to the plaintiff tribe).

For an example of the rare case relying on *Coeur d'Alene* in a non-land context, consider *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002). *Barton* considered a claim by Medicaid recipients that they had a right to money the state stood to receive from a nationwide settlement of claims against tobacco companies. Under that settlement, states were to receive significant amounts of money to compensate them for the Medicaid expenses they incurred to pay for treatment of their citizens' tobacco-related illnesses. The plaintiffs argued that money the state received that exceeded those expenses should be passed on to the former tobacco users themselves.

The court rejected that claim on Eleventh Amendment grounds. Citing *Coeur d'Alene*, the court stated that "an attempt to force the allocation of state funds implicates core sovereign interests." Noting also that Congress, anticipating the tobacco settlement, had amended the Medicaid statute so as to allow states to disburse the settlement money as they saw fit, the court concluded that "[i]nterference with the allocation of state funds, where Congress has expressly enacted that states may allocate such funds as they please, is an interference with a 'special sovereign interest' under *Coeur d'Alene*."

Part III: Substantive Rights Under the Due Process Clause

Chapter 8: Incorporation of the Bill of Rights

Note: The Current State of Incorporation

Insert before the next Note at page 538:

4. The Court's slow progress toward incorporating the few remaining non-incorporated Bill of Rights provisions advanced again in 2019, when the Court in *Timbs v. Indiana*, 139 S.Ct. 682 (2919), unanimously held that the Eighth Amendment's Excessive Fines Clause applied to the states. Eight justices joined an opinion by Justice Ginsburg holding that a Bill of Rights provision applied to the states via the Due Process Clause if it was "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition" (quoting *McDonald*). Surveying the history of the right in question, she concluded that it was both.

Justice Gorsuch joined the majority opinion but wrote a short concurrence to suggest that the Privileges or Immunities Clause furnished a better doctrinal home for incorporated rights. Justice Thomas went further. Repeating what he did in *McDonald*, he wrote separately (as in *McDonald*, only for himself) rejecting the Due Process Clause as that proper doctrinal home and instead concluding that the right to be free from excessive fines was incorporated via the Privileges or Immunities Clause.

Chapter 9: The Right to An Abortion

C. The Casey Resolution (?)

Insert at the end of page 581:

6. In recent years, abortion opponents have shifted their tactics to regulations of abortion providers, justified as measures to protect women's health. Recall that *Casey* accepted this justification as a legitimate reason for regulating abortion, but cautioned that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right" and are thus unconstitutional. When Texas enacted a stringent version of such regulations, abortion providers sued, and the Court reviewed the lower court opinion upholding the regulations as consistent with *Casey*.

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

Justice BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey* (1992) [*Supra* this Chapter], 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 "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

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."

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 previability abortion, each constitutes an undue burden on abortion access, *Casey* (plurality opinion), and each violates the Federal Constitution.

I

. . .

B

[Petitioners], a group of abortion providers . . . , filed the present lawsuit in Federal District Court. They sought an

injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court . . . conducted a 4–day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles."

2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually."

3. Prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013."

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas."

5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." . . .

6. "Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities."

7. The suggestion "that these seven or eight providers could meet the demand of the entire state stretches credulity."

8. "Between November 1, 2012 and May 1, 2014," that is, before and after enforcement of the admitting-privileges requirement, "the decrease in geographical distribution of abortion facilities" has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider.

9. The "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women."

10. "The great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny."

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers

as compared to nonsurgical-center facilities."

13. "Women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."

14. "There are 433 licensed ambulatory surgical centers in Texas," of which "336 . . . are apparently either 'grandfathered' or enjoy the benefit of a waiver of some or all" of the surgical-center "requirements."

15. The "cost of coming into compliance" with the surgical-center requirement "for existing clinics is significant," "undisputedly approaching 1 million dollars," and "most likely exceeding 1.5 million dollars," with "some . . . clinics" unable to "comply due to physical size limitations of their sites." The "cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars."

On the basis of these and other related findings, the District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, . . . in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities." On August 29, 2014, the court enjoined the enforcement of the two provisions.

C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. . . . On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded: . . .

- [A] state law "regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest."

- "Both the admitting privileges requirement and" the surgical-center requirement "were rationally related to a legitimate state interest," namely, "raising the standard and quality of care for women seeking abortions and . . . protecting the health and welfare of women seeking abortions."

- The "plaintiffs" failed "to proffer competent evidence contradicting the legislature's statement of a legitimate purpose."

- "The district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit . . . in the name of the undue burden inquiry."

- Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions "imposes an undue burden on a large fraction of women."

- The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs' expert witnesses (Dr. Grossman) that abortion providers in Texas "'will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all'" of the clinics failing to meet the surgical-center requirement "'are forced to close.'" But Dr. Grossman's opinion is (in the Court of Appeals' view) "*ipse dixit*"; the "record lacks any actual evidence regarding the current or future capacity of the eight clinics''; and there is no "evidence in the record that" the providers that currently meet the surgical center requirement "are operating at full capacity

or that they cannot increase capacity."

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. . . .

III

Undue Burden—Legal Standard

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

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007)) [Note *supra* this Chapter].

The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. See *Casey* (opinion of the Court) (performing this balancing with respect to a spousal notification provision); *id.* (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, *e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) [Note *supra* Chapter 7]. 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. *Casey* (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some of the legislative findings. In these circumstances, we said, "uncritical deference to Congress' factual findings . . . is inappropriate."

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this

Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting–Privileges Requirement

Turning to the lower courts' evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H.B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." Tex. Admin. Code, tit. 25, § 139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a "physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." The District Court held that the legislative change imposed an "undue burden" on a woman's right to have an abortion. We conclude that there is adequate legal and factual support for the District Court's conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. But the District Court found that it brought about no such health-related benefit. The court found that "the great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

- A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%.

- Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200).

- Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic.

- Expert testimony stating that "it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization" and "in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital."

- Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot.

- Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as "abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility."

- Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home.

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working

arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health. . . .

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey* (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. . . .

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." See *Casey* (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion.

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, *infra*, may not have imposed an undue burden is this: Although "H. B. 2 caused the closure of *some* clinics" (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H.B. 2). But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. The District Court credited that evidence and concluded from it that H.B. 2 in fact led to the clinic closures. The dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H.B. 2's requirements would be that they might "force unsafe facilities to shut down." To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He "staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised" and had "dirty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong." Gosnell's behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell's deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

V

Undue Burden—Surgical–Center Requirement

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. . . . 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. . . .

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

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

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." We take this statement as a finding that these few facilities could not "meet" that "demand."

The Court of Appeals held that this finding was "clearly erroneous." It wrote that the finding rested upon the "*ipse dixit*" of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i.e.*, the seven or eight) are operating at full capacity or could not increase capacity. Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court's finding. . . .

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence rebutting that issue to the District Court. Texas admitted that it presented no such evidence. . . .

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from $1 million per facility (for facilities with adequate space) to $3 million per facility (where additional land must be purchased). This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so.

VI

We consider three additional arguments that Texas makes and deem none persuasive.

First, Texas argues that facial invalidation of both challenged provisions is precluded by H.B. 2's severability clause. [The Court rejected this argument.]

Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads *Casey* to have required. But *Casey* used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is *relevant*," a class narrower than "all women," "pregnant women," or even "the class of *women seeking abortions* identified by the State." *Casey* (opinion of the Court) (emphasis added). Here, as in *Casey*, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." . . .

Third, Texas looks for support to *Simopoulos v. Virginia*, 462 U.S. 506 (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester abortions. This case, however, unlike *Simopoulos*, involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. Most abortions in Texas occur in the first trimester, not the second. More importantly, in *Casey* we discarded the trimester framework, and we now use "viability" as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health. Because the second trimester includes time that is both previability and postviability, *Simopoulos* cannot provide clear guidance. . . .

* * *

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

It is so ordered.

Justice GINSBURG, concurring.

The Texas law called H.B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H.B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (C.A.7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* (collecting studies and concluding "abortion is one of the safest medical procedures performed in the United States"); Brief for Social Science Researchers as *Amici Curiae* (compiling studies that show "complication rates from abortion are very low"). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. Given those realities, it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions." When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. So long as this Court adheres to *Roe* and *Casey*, targeted Regulation of Abortion Providers laws like H.B. 2 that "do little or nothing for health, but rather strew impediments to abortion" cannot survive judicial inspection.

Justice THOMAS, dissenting.

. . . This case . . . underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Casey* and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated. . . .

II

Today's opinion . . . reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions.

Nearly 25 years ago, in *Casey*, 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." *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, "where 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*.

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

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." The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. 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 outweighed 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*. This Court emphasized that this "traditional rule" of deference "is consistent with *Casey*." . . .

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." But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science. 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. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment.

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. "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 unborn." *Gonzales* (emphasis added); see *Casey* (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century.

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come. As in *Casey*, today's opinion "simply . . . highlights certain facts in the record that apparently strike the . . .

Justices as particularly significant in establishing (or refuting) the existence of an undue burden." *Casey* (Scalia, J., concurring in judgment in part and dissenting in part). As in *Casey*, "the opinion then simply announces that the provision either does or does not impose a 'substantial obstacle' or an 'undue burden.'" *Casey* (opinion of Scalia, J). And still "we do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." *Id.* (opinion of Scalia, J.). All we know is that an undue burden now has little to do with whether the law, in a "real sense, deprives women of the ultimate decision," *Casey*, and more to do with the loss of "individualized attention, serious conversation, and emotional support."

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*. 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*. 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.

* * *

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 (1989). I respectfully dissent.

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

III

A sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements is unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, *e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) [Note *supra* Chapter 7). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve.

Thus, what matters for present purposes is not the effect of the H.B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a "large fraction" of Texas women of reproductive age. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a "large fraction" of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H.B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H.B. 2 took effect

and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law . . . .

A

I do not dispute the fact that H.B. 2 caused the closure of some clinics. Indeed, it seems clear that H.B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. Gosnell had not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as ASCs. If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes. And if there were any similarly unsafe facilities in Texas, H.B. 2 was clearly intended to put them out of business.[13]

While there can be no doubt that H.B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some clinics have or may have closed for at least four reasons other than the two H.B. 2 requirements at issue here. These are:

1. *H. B. 2's restriction on medication abortion.* In their first case, petitioners challenged the provision of H.B. 2 that regulates medication abortion, but that part of the statute was upheld by the Fifth Circuit and not relitigated in this case. The record in this case indicates that in the first six months after this restriction took effect, the number of medication abortions dropped by 6,957 (compared to the same period the previous year).

2. *Withdrawal of Texas family planning funds.* In 2011, Texas passed a law preventing family planning grants to providers that perform abortions and their affiliates. In the first case, petitioners' expert admitted that some clinics closed "as a result of the defunding," and as discussed below, this withdrawal appears specifically to have caused multiple clinic closures in West Texas.

3. *The nationwide decline in abortion demand.* Petitioners' expert testimony relies on a study from the Guttmacher Institute which concludes that "the national abortion rate has resumed its decline, and *no evidence was found that the overall drop in abortion incidence was related to the decrease in providers or to restrictions implemented between 2008 and 2011*." Consistent with that trend, "the number of abortions to residents of Texas declined by 4,956 between 2010 and 2011 and by 3,905 between 2011 and 2012."

4. *Physician retirement (or other localized factors).* Like everyone else, most physicians eventually retire, and the retirement of a physician who performs abortions can cause the closing of a clinic or a reduction in the number of abortions that a clinic can perform. . . .

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason. . . .

Precise findings are important because the key issue here is not the number or percentage of clinics affected, but the effect of the closures on women seeking abortions, *i.e.*, on the capacity and geographic distribution of clinics used by those women. To the extent that clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H.B. 2, the corresponding burden on abortion access may not be factored into the access analysis. Because there was ample reason to believe that some closures were caused by these other factors, the District Court's failure to ascertain the reasons for clinic closures means that, on the record before us, there is no way to tell which closures actually count. Petitioners—who, as plaintiffs, bore the burden of proof—cannot simply point to

[13] The Court attempts to distinguish the Gosnell horror story by pointing to differences between Pennsylvania and Texas law. But Texas did not need to be in Pennsylvania's precise position for the legislature to rationally conclude that a similar law would be helpful.

temporal correlation and call it causation.

B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact on access to abortion. . . .

So much for capacity. The other potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H.B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a "large fraction" of women of reproductive age live too far away from any open clinic. Based on the Court's holding in *Casey*, it appears that the need to travel up to 150 miles is not an undue burden, and the evidence in this case shows that if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H.B. 2). Because the record does not show why particular facilities closed, the real figure may be even higher than 95%.

We should decline to hold that these statistics justify the facial invalidation of the H.B. 2 requirements. The possibility that the admitting privileges requirement *might* have caused a closure in Lubbock is no reason to issue a facial injunction exempting Houston clinics from that requirement. I do not dismiss the situation of those women who would no longer live within 150 miles of a clinic as a result of H.B. 2. But under current doctrine such localized problems can be addressed by narrow as-applied challenges. . . .

Chapter 10: Modern Due Process Methodologies

***Insert at page 640, before the Note*:**

Problem: Sex Toys

In the State of Jefferson, a law reads as follows:

> "The sale or other distribution of any device whose primary purpose is to stimulate the sexual organs of any person is hereby prohibited."

Sam's Playland is an adult-oriented book and novelty shop in Jefferson City, the capital of the State of Jefferson. The store sells, among other things, items that come within the statute's prohibition (*e.g.*, vibrators). The owner of the store and one of its customers sues, alleging that the law violates the Due Process Clause as construed in *Lawrence v. Texas*.

What arguments would you make for the plaintiffs? For the State? How do you think a court would rule, and why?

Insert at page 665, before the Note:

Note: The Implications of *Obergefell*

Obergefell held that same-sex couples had the right to marry. But what does "marriage" mean? In a case from 2017, the Court encountered a claim that *Obergefell* left room for states to treat same-sex married couples differently than their opposite-sex counterparts.

In *Pavan v. Smith*, 137 S.Ct. 2075 (2017), the Court reviewed a decision by the Arkansas Supreme Court that upheld a provision of that state's birth certificate law that discriminated against same-sex married couples. Under that provision, the husband in an opposite-sex married couple was presumptively listed as the father of any child born to his wife, including in situations where the husband was not the biological father—most notably, in cases of artificial insemination using an anonymous sperm donor. By contrast, in *Pavan* two women in same-sex marriages gave birth via artificial insemination, but the state refused to identify their female spouses as the child's second parent on the child's birth certificate.

The Court granted the couples' *cert.* petitions and summarily reversed the Arkansas court's decision. (A "summary decision" is one that the Court renders without briefing on the merits or oral argument.) In a *per curiam* opinion (*i.e.*, an opinion "by the Court" rather than one written by a particular justice), the Court noted that *Obergefell* required states to provide to same-sex couples "the constellation of benefits that the States have linked to marriage." The Court rejected the state's argument that its birth certificate regime concerned itself with biological parentage rather than marriage, explaining (as noted above) that a birth certificate would identify the husband in an opposite-sex marriage as the father of a child even when he clearly was not the biological father, as in a case of insemination with the sperm of an anonymous donor.

Justice Gorsuch, joined by Justices Thomas and Alito, dissented. He noted that summary reversals are reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." He argued that *Pavan* was not such a case, given Arkansas's argument that its birth certificate regime was connected to biological parenthood rather than marriage, and thus was not affected by *Obergefell*. He acknowledged that Arkansas law made an exception for this biology-based rule for artificial-insemination/anonymous sperm donor births. However, he faulted the plaintiffs for not challenging that exception but instead challenging the state's overall birth certificate statute and its biology-based rules of decision. He also criticized the Court for summarily reversing the state court when the state had already conceded that the artificial insemination provision's discrimination against same-sex couples was unconstitutional, and had acknowledged that "the benefits afforded non-biological parents under [that exception] must be afforded equally to both same-sex and opposite-sex couples."

Despite the result in *Pavan*, the state's conduct in that case suggests that litigation may continue to arise over what exactly constitutes "the constellation of benefits that the States have linked to marriage." For example, litigation is pending in Texas about whether *Obergefell* requires that cities provide same-sex spouses of city employees the same benefits they provide opposite-sex spouses. *See Pidgeon v. Turner*, 2017 WL 2829350 (Tex. Supreme Ct. June 30, 2017) (remanding to the lower court the question whether *Obergefell* compels equality in city-provided employee benefits). The Supreme Court denied *cert.* in December, 2017, and it appears as though there has been no further relevant activity in the case.

Insert at the end of page 666:

Problem: Plural Marriage

Plural marriage ("polygamy") has been an issue in American constitutional law since the establishment of the Church of Jesus Christ of Latter-day Saints, colloquially known as the Mormon Church, which in the nineteenth century embraced polygamy as a central tenet of that faith. In 1878, the Supreme Court rejected a claim that the federal government's prohibition of polygamy in the Utah Territory violated Mormons' rights under the First Amendment's guarantee of the right to free religious exercise. *Reynolds v. United States*, 98 U.S. 145 (1878).

In recent years, attention has focused on the continued polygamist beliefs and preferences of certain fundamentalist offshoots of the Mormon Church, but also on the wishes of non-Mormons to enter into plural marriages. Leave aside the Free Exercise Clause argument. Consider instead claims, both by fundamentalist Mormons and non-Mormons, that their substantive due process rights are violated by state laws restricting polygamy. In particular, consider two hypothetical laws, and challenges to those laws:

First, consider a law that bans "co-habitation," with "co-habitation" defined as "a legally-married couple living with a third (or additional) person as if that third person was a member of the married couple's intimate life." Assume that a three-person grouping wishes to live a polygamous lifestyle, in which the three share a household and a common intimate life. (They do

not seek a marriage license officially recognizing their relationship as a legal marriage.) Two of the three persons are legally married to each other; the third is legally single; thus, they would violate the statute. What arguments could that group make that *Lawrence v. Texas* supports their claim that the statute violates the Due Process Clause?

Second, consider a law that defines marriage as "the union of two adults." A three-person grouping applies for, and is denied, a marriage license. What arguments could that group make that *Obergefell v. Hodges* supports their argument that the law violates the Due Process Clause?

Part IV: Constitutional Equality

Chapter 12: Suspect Classes and Suspect Class Analysis

A. Sex Discrimination

***Insert at page 736, before Part B*:**

Problem: Single-Sex Public Education

In recent years, some educational experts have suggested that some junior high and high school students might benefit from attending a single-sex, rather than a co-ed, school. Among other theories, it has been suggested that single-sex education diminishes social and dating pressures in the classroom, that it helps girls take leadership positions that they would shy away from in a co-ed environment, and that it helps both girls and boys develop their interests and talents free from gendered stereotypes. It is further suggested that these phenomena lead to better academic outcomes and outcomes for students' socio-emotional development.

In 2015 the State of Nebraska Department of Education commissioned a study by several educational experts to consider this issue. The executive summary of that study reads as follows:

> "As in previous reviews, the results are equivocal. There is some support for the premise that single-sex schooling can be helpful, especially for certain outcomes related to academic achievement and more positive academic aspirations. For many outcomes, there is no evidence of either benefit or harm. There is limited support for the view that single-sex schooling may be harmful or that coeducational schooling is more beneficial for students."

Based on this study, the Department decides to require every school district in the state to offer a single-sex educational experience to any junior high or high school student who would like one. Traditional co-ed schools would be the norm, but any junior high or high school student who wished to avail himself or herself of a single-sex education could obtain one from the state.

You are a lawyer employed by the State Department of Education. You are asked to outline the arguments you would make defending the constitutionality of this program. (Assume that someone would have standing to sue.) How would you structure that defense? Is there any additional information you'd like from the Department to help your argument? Would you suggest any particular features for the program in order to buttress your argument?

* * * * *

The following case considers a gender-based immigration statute similar to, but nevertheless distinct from, the one upheld in *Nguyen*. Beyond the fact that all six justices who reached the equal protection issue voted to strike down the law, is there a difference in tone between this case and the description you read of *Nguyen*? If so, what might account for that difference?

Sessions v. Morales-Santana
137 S.Ct. 1678 (2017)

Justice GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen, the other, a citizen of another nation. The main rule appears in 8 U.S.C. §1401(a)(7). Applicable to married couples, §1401(a)(7) requires a period of physical presence in the United States for the U.S.-citizen parent. [At the time of the plaintiff's birth, this rule required the U.S.-citizen parent, at the time of the child's birth, to have lived in the United States for a period of at least ten years, five of which had to be after turning 14 years old.] That main rule is rendered applicable to unwed U.S.-citizen fathers by §1409(a). Congress ordered an exception, however, for unwed U.S.-citizen mothers. Contained in §1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón Morales–Santana, was born in the Dominican Republic when his father was just 20 days short of meeting §1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic, Morales–Santana asserts that the equal protection principle implicit in the Fifth Amendment entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." . . .

I

* * *

B

Respondent Luis Ramón Morales–Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U.S. citizenship at birth based on the citizenship of his biological father, José Morales, who accepted parental responsibility and included Morales–Santana in his household.

José Morales was born in Guánica, Puerto Rico, on March 19, 1900. Puerto Rico was then, as it is now, part of the United States . . . . After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday, therefore failing to satisfy §1401(a)(7)'s requirement of five years' physical presence after age 14. He did so to take up employment as a builder-mechanic for a U.S. company in the then-U.S.-occupied Dominican Republic.

By 1959, . . . he was living with Yrma Santana Montilla, a Dominican woman he would eventually marry. In 1962, Yrma gave birth to their child, respondent Luis Morales–Santana. . . . Yrma and José married in 1970, and . . . José was then added to Morales–Santana's birth certificate as his father. . . . In 1975, when Morales–Santana was 13, he moved to Puerto Rico, and by 1976, the year his father died, he was attending public school in the Bronx, a New York City borough.

C

In 2000, the Government placed Morales–Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 17, 1995. Morales–Santana ranked as an alien despite the many years he lived in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales–Santana's claim to citizenship

derived from the U.S. citizenship of his father, and ordered Morales–Santana's removal to the Dominican Republic. In 2010, Morales–Santana moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U.S.-citizen father violated the Constitution's equal protection guarantee. The Board of Immigration Appeals (BIA) denied the motion.

The United States Court of Appeals for the Second Circuit reversed the BIA's decision. . . .

II

Because §1409 treats sons and daughters alike, Morales–Santana does not suffer discrimination on the basis of *his* gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales–Santana's birth and was not accorded the right an unwed U.S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales–Santana may seek to vindicate his father's right to the equal protection of the laws. . . .

III

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. *See, e.g*., *Hoyt v. Florida*, 368 U.S. 57 (1961) (women are the "center of home and family life," therefore they can be "relieved from the civic duty of jury service"); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (States may draw "a sharp line between the sexes") [Both note *supra* this Chapter]. Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." . . . Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification." *United States v. Virginia* (1996) (*Supra* this chapter).

A

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) [Note *supra* this Chapter]. Moreover, the classification must substantially serve an important governmental interest *today*, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 576 U.S. ___ (2015). Here, the Government has supplied no "exceedingly persuasive justification," *Virginia*, for §1409(a) and (c)'s "gender-based" and "gender-biased" disparity.

1

History reveals what lurks behind §1409. Enacted in the Nationality Act of 1940 (1940 Act), §1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents. During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. "[D]ominance [of] the husband," this Court observed in 1915, "is an ancient principle of our jurisprudence." *Mackenzie v. Hare*, 239 U.S. 299 (1915). Through the early 20th century, a male citizen automatically conferred U.S. citizenship on his alien wife. A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien. . . . And from 1790 until 1934, the foreign-born child of a married couple gained U.S. citizenship only through the father.

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed §1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father ... [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian."

This unwed-mother-as-natural-guardian notion renders §1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture.

2

For close to a half century . . . this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." In particular, we have recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate." *Mississippi Univ. for Women*.

In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as §1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives.[13] Laws according or denying benefits in reliance on "[s]tereotypes about women's domestic roles," the Court has observed, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Correspondingly, such laws may disserve men who exercise responsibility for raising their children. In light of the equal protection jurisprudence this Court has developed since 1971, §1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

B

In urging this Court nevertheless to reject Morales–Santana's equal protection plea, the Government cites three decisions of this Court: *Fiallo v. Bell*, 430 U.S. 787 (1977); *Miller v. Albright*, 523 U.S. 420 (1998); and *Nguyen v. INS*, 533 U.S. 53 (2001) [Note *supra* this chapter]. None controls this case.

The 1952 Act provision at issue in *Fiallo* gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. . . . This case, however, involves no entry preference for aliens. Morales–Santana claims he is, and since birth has been, a U.S. citizen. . . .

The provision challenged in *Miller* and *Nguyen* as violative of equal protection requires unwed U.S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U.S. citizenship to those children. After *Miller* produced no opinion for the Court, we took up the issue anew in *Nguyen*. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. Morales–Santana's challenge does not renew the contest over §1409's paternal-acknowledgment requirement

[13] Even if stereotypes frozen into legislation have "statistical support," our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn. [*S*]*ee, e.g., Craig v. Boren* (1976) [*Supra* this chapter]. In fact, unwed fathers assume responsibility for their children in numbers already large and notably increasing.

(whether the current version or that in effect in 1970), and the Government does not dispute that Morales–Santana's father, by marrying Morales–Santana's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his] child." And unlike *Nguyen*'s parental-acknowledgment requirement, §1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as "minimal."

C

Notwithstanding §1409(a) and (c)'s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a connection between the child to become a citizen and the United States and (2) preventing "statelessness," *i.e.*, a child's possession of no citizenship at all. Even indulging the assumption that Congress intended §1409 to serve these interests, neither rationale survives heightened scrutiny.

1

We take up first the Government's assertion that §1409(a) and (c)'s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U.S. values than unmarried women do. Instead, it presents a novel argument . . . .

An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth. An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. . . .

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U.S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U.S.-citizen fathers, but not unwed U.S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. Lump characterization of that kind, however, no longer passes equal protection inspection. . . .

2

The Government maintains that Congress established the gender-based residency differential in §1409(a) and (c) to reduce the risk that a foreign-born child of a U.S. citizen would be born stateless. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S.-citizen mother than it was for the foreign-born child of an unwed U.S.-citizen father. But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." Reducing the incidence of statelessness was the express goal of other sections of the 1940 Act. The justification for §1409's gender-based dichotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "post hoc in response to litigation." *Virginia*.

Infecting the Government's risk-of-statelessness argument is an assumption without foundation. "[F]oreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would protect the child of the U.S.-citizen father against

statelessness by providing that the child would take his mother's citizenship." The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child. . . . One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U.S.-citizen mothers while ignoring the same risk for children of unwed U.S.-citizen fathers. . . .

In sum, the Government has advanced no "exceedingly persuasive" justification for §1409(a) and (c)'s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales–Santana seeks, *i.e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term §1409(c) reserves for unwed mothers. [The Court concluded that Congress, if had been aware of the unconstitutionality of its gender-based residency provisions for conferring citizenship on foreign-born children, would have required the longer residency requirement for all citizen-parents. This result would have left Morales-Santana without a remedy. The Court concluded that Congress would have to determine the time period it preferred, as long as that period was gender-neutral.]

Justice GORSUCH took no part in the consideration or decision of this case.

Justice THOMAS, with whom Justice ALITO joins, concurring in the judgment in part.

[Justice Thomas agreed with the majority that, regardless of the outcome of the plaintiff's sex equality claim, the Court could not grant him relief. Thus, he declined to reach both the standing and the underlying sex quality issues the majority discussed.]

Chapter 13: Race and the Constitution

C. Dismantling Jim Crow

1. The Run-Up to *Brown*

***Insert at page 789, before the Note*:**

Note: "Gravely Wrong the Day it Was Decided"

In the years after 1944, *Korematsu* has been heavily criticized for upholding a government action characterized as overtly racist. This criticism spanned the political spectrum and extended beyond lawyers and judges: for example, in the 1980's Congress passed a bill, signed by President Reagan, compensating the remaining living detainees. In 2011, the Solicitor General admitted that his predecessor, who argued for the government in *Korematsu* at the Supreme Court, had kept from the Court evidence that even in 1942 military and civilian authorities did not consider the threat from disloyal Japanese-Americans to be a significant one.

In 2018, the Court upheld President Trump's executive order restricting immigration from several countries, most of which were majority-Muslim, the effect of which fell heavily on Muslims. *Trump v. Hawaii*, 138 S.Ct. 2392 (2018). The Court upheld the order despite arguments that it was based on animus against Islam and Muslims. This facet of the *Hawaii* case is discussed in a note in Chapter 15 of this supplement.

In upholding the order, Chief Justice Roberts, writing for the five-justice majority in *Hawaii*, rejected Justice Sotomayor's argument in her dissent that the order was similar to the exclusion order upheld in *Korematsu*. He concluded his opinion with the following:

> Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.
>
> The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." *Korematsu* (Jackson, J., dissenting).

E. Race Consciousness Today

***Insert at page 889, before the Note*:**

Note: Clarifying Strict Scrutiny(?): The *Fisher* Litigation

1. In two separate opinions from 2013 and 2016, the Court issued opinions in an affirmative action case that provided the Court with the opportunity to clarify the meaning of strict scrutiny. The picture resulting from those two opinions nevertheless remains murky.

2. In 2008, Abigail Fisher, a white high school student, applied and was rejected for admission to the undergraduate program at the University of Texas at Austin. At that time the school had a bifurcated admissions program. Most admissions slots were awarded under a state law (the "Top Ten Percent" law) that provided automatic admission to any student who graduated in the top ten percent of any approved Texas high school. The remaining admissions offers were awarded based on a holistic consideration of each candidate that was comprised of an "academic index" (AI) (test scores and high school performance) and a "personal achievement index" (PAI). The PAI was comprised of the combination of scores the applicant received for his application essays and for factors such as leadership and a student's ability to contribute to the student body. The latter criterion in turn was comprised in part of any "special circumstances" the applicant featured. By the time Fisher applied for admission, the "special circumstances" category included a consideration of the applicant's race—thus, as the Court explained in its second opinion in this case, race was "a factor of a factor of a factor" in the admissions decision.

Fisher did not graduate in the top 10% of her Texas high school class, and thus was considered for admission as part of this latter, holistic, review. When she was rejected she sued, alleging that the use of race as part of the PAI violated the Equal Protection Clause.

3. When the case first reached the Supreme Court, it reversed the lower court's judgment for the school, concluding that the lower court had applied a mistakenly deferential level of review. *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013) ("*Fisher I*"). Writing for seven justices of an eight-justice Court, Justice Kennedy agreed with the lower court that courts should defer to the university's expertise about its educational mission—here, its judgment that racial diversity was essential to that mission. However, he concluded that the court had inappropriately deferred to the university's judgment whether the means it adopted were narrowly tailored to achieve the goal of fulfilling that mission. In particular, he concluded that it was the court's duty to ensure that race-conscious admissions plans treated all applicants as individuals, "'and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application'" (quoting *Grutter v. Bollinger* (2003) (*Supra* this chapter)).

Justices Scalia and Thomas both joined the majority opinion but each also wrote a separate concurrence. Justice Ginsburg dissented. She argued that the Top Ten Percent plan, which was unchallenged in the case, was itself race-conscious, as the Texas Legislature had adopted it with

full knowledge that residential segregation in Texas had created a situation where a high school-based admissions plan like the Top Ten Percent would result in a particular racial make-up at the University of Texas. She urged that legislatures be explicitly allowed to consider race in light of the lingering effects of past discrimination, and repeated the concern she expressed in her dissent in *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Note *supra* this Chapter), that to hold otherwise would encourage legislatures and universities to camouflage their use of race. Justice Kagan did not participate.

4. On remand, the appellate court again ruled for the university, and Fisher again appealed to the Supreme Court. This time, the Court on a 4-3 vote upheld the lower court decision. *Fisher v. University of Texas*, 136 S.Ct. 2198 (2016) ("*Fisher II*"). (Justice Kagan again did not participate, and Justice Scalia had died before the opinion was released.) Writing for those four justices, Justice Kennedy concluded that the university's admissions plan satisfied strict scrutiny as that standard had been set forth in *Fisher I*. He accepted as compelling the university's goal of ensuring "the educational benefits that flow from student diversity." He rejected Fisher's argument that the university had not specified that goal more precisely, observing that to do so might result in the university adopting numerical goals for students of different races, a step that might itself violate the Fourteenth Amendment.

Justice Kennedy then turned to the means by which the university sought to achieve that goal. He rejected Fisher's argument that the Top Ten Percent plan already achieved the "critical mass" of minority students necessary to meet the university's diversity goal, noting the "months of study" the university did before concluding that that plan was inadequate, and citing data indicating "consistent stagnation" in the university's enrollment of minorities. He also rejected Fisher's argument that the small admissions effects of the race-based component of the university's admissions procedure rendered its use of race unconstitutional, concluding that that component had led to "meaningful, if still limited," increases in diversity.

Finally, he rejected Fisher's argument that race-neutral means could have achieved the university's goals. He noted the failure of the university's minority outreach efforts, and, in response to Fisher's suggestion that the university simply uncap the number of admissions offered through the Top Ten Percent plan, he quoted Justice Ginsburg's opinion in *Fisher I* observing that that plan was motivated by race-consciousness.

5. Justice Thomas wrote a dissent for himself only, calling for *Grutter* to be overruled. Justice Alito dissented for himself, Chief Justice Roberts and Justice Thomas. He opened his dissent by writing "Something strange has happened since [*Fisher I*]." In particular, he complained that the Court in *Fisher II* had ignored the teaching of that earlier opinion, and had applied a more deferential standard than the one it had set forth in 2013. He wrote:

> "In [*Fisher I*], 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."

The balance of his opinion was devoted to demonstrating what he viewed as the Court's application of an inappropriately deferential review of university's use of race.

Consider both *Grutter*'s and *Fisher II*'s application of strict scrutiny. Do you agree that they reflect the strict scrutiny the Court has insisted on when reviewing any government uses of race? In particular, was *Fisher II*'s application of strict scrutiny consistent with *Fisher I*'s description of it? Was it consistent with *Parents Involved*?

Chapter 14: The Intent Requirement

***Insert at Page 910, before the Note*:**

Note: An Example of Discriminatory Intent Analysis

It should be clear from *Davis*, *Arlington Heights*, and *Feeney* that the discriminatory intent inquiry is highly fact-specific. The following appellate case provides an example of that inquiry in action. Note the lack of a "smoking gun" revealing the alleged discriminatory intent—*e.g.*, explicit statements about residents wanting to exclude minorities from their community. Do you agree with how the court analyzed the intent question in the absence of such a "smoking gun"? Why or why not?

Mhany Management, Inc. v. County of Nassau
819 F.3d 581 (2nd Cir. 2016)

[This case dealt with a city's plan to convert under-used city-owned real estate into housing, and the ensuing controversy about the type of housing that would be built.]

A. Nassau County and Garden City

The Village of Garden City is a municipal corporation organized under the laws of the State of New York and located in Nassau County. As of the year 2000, individuals of Hispanic or African–American ethnicity comprised 20.3% of Nassau County's population. However, these minority groups comprised a disproportionate share of the County's low-income population. While constituting 14.8% of all households in Nassau County, African–Americans and Hispanics represented 53.1% of the County's "very low" income, non-elderly renter households. In addition, African-Americans made up 88% of the County's waiting list for Section 8 housing. Under the Section 8 program, the federal government provides funds to local housing authorities, which then subsidize rental payments for qualifying low-income tenants in privately-owned buildings.

Garden City's African-American and Hispanic population in the year 2000 was 4.1%. However, excluding the 61% of the minority population representing students living in dormitories, Garden City's minority population was only 2.6%. In addition, only 2.3% of the households in Garden City were headed by an African–American or Hispanic person. However, several of the communities surrounding Garden City are "majority-minority," communities in which minorities make up a majority of the population.

Although the lack of affordable housing has long been a problem for Nassau County, Garden City contains no affordable housing. Indeed, in the past, Garden City and its residents have resisted the introduction of affordable housing into the community. . . .

B. The Social Services Site

In 2002, Nassau County faced a budget and infrastructure crisis. Under the leadership of then-County Executive Thomas Suozzi, the County undertook a Real Estate Consolidation Plan, which involved consolidating County operations in several facilities and selling excess government property in order to raise revenue to fund renovations of the County's existing operations.

One of the properties proposed for sale under the Real Estate Consolidation Plan was a parcel of land owned by Nassau County within the boundaries of Garden City. This parcel of land was part of Garden City's Public orP– Zone. Garden City's P–Zone encompasses numerous Nassau County Buildings, including the Nassau County Police Headquarters, the County Executive Building, and the Nassau County Supreme Court Building.

The portion of the P–Zone site at issue in this case, referred to as the "Social Services Site," is an approximately 25–acre site that housed the former Nassau County Social Services Building . . . .

C. Garden City's Rezoning

In June 2002, at the County's request, Garden City began the process of rezoning the Social Services Site. This process was managed by the Garden City Board of Trustees, the elected body which governs Village affairs. In response to the County's request, the Board of Trustees created a sub-committee (the "P–Zone Committee") charged with retaining a planner and reviewing zoning options for the Social Services Site, as well as the remainder of the P– Zone properties in Garden City. This P–Zone Committee consisted of Village Trustees Peter Bee, Peter Negri, and Gerard Lundquist. Trustee Bee was the chairman of the P– Zone Committee. Garden City also retained the planning firm of Buckhurst Fish and Jacquemart ("BFJ") to provide a recommendation with regard to the rezoning of the Social Services Site. . . .

On April 29, 2003, BFJ submitted its proposal to the P–Zone Committee, recommending a "CO–5(b) zone" for the Social Services Site. BFJ proposed applying "multi-family residential group" or "R–M" zoning controls to this property. R–M zoning would have allowed for the construction of up to 311 residential apartment units on the Site, or 75 single-family homes. BFJ reiterated the proposed R–M zoning in a May 2003 report to the P–Zone Committee, stating that the rezoning would "be likely to generate a net tax benefit to the Village." . . .

Throughout the rezoning process, the P–Zone Committee also kept Garden City's four Property Owners' Associations ("POAs") apprised of the process. . . . The Social Services Site is located within the neighborhood of the Eastern Property Owners' Association. On May 29, 2003, BFJ gave a PowerPoint presentation of its May 2003 report at a public forum. At the first forum, designed to solicit public input on the proposal, several residents expressed concern about the impact of 311 residential units on traffic and schools. In response to these citizen concerns, BFJ analyzed these issues further.

In July 2003, BFJ issued a revised version of its study, which reiterated the proposal for R–M zoning. BFJ emphasized again that its proposal "would be careful of not overwhelming the neighborhoods with any significant adverse environmental impacts, particularly traffic, visual effects, or burdens on public facilities." Responding to issues raised at the citizen forum, the July 2003 report states that "there would be a smaller number of school children generated by the new development than with the development of single-family homes. . . . With a community aimed at young couples and empty nesters, there could be as few as 0.2 to 0.3 public school children per unit." Upon review of the report, the P–Zone Committee adopted BFJ's recommendation for R–M zoning for the approval of the Board of Trustees.

In September 2003, as required by state law, BFJ issued a draft Environmental Assessment Form ("EAF") for the proposed rezoning. The EAF concluded that the proposed rezoning to R–M "will not have a significant impact on the environment." The EAF further stated that the proposed multi-family development at the Site would not "result in the generation of traffic significantly above present levels" and would have a minimal impact on schools. In addition, the EAF emphasized that "in terms of potential aesthetic impacts, the proposed zoning controls were specifically designed to accommodate existing conditions, respect existing neighborhoods—particularly residential neighborhoods, maximize the use of existing zoning controls and minimize adverse visual impacts." Michael Filippon, the Superintendent of the Garden City Buildings Department, concurred in these conclusions.

On October 17, 2003, an ad was placed in the Garden City News entitled, "Tell Them What You Think About the County's Plan for Garden City." This notice stated:

> Where is the Benefit to Garden City? Are We Being Urbanized? . . .
>
> The County is asking the Village to change our existing zoning—P (Public use) ZONE—to allow the County to sell the building and land . . . now occupied by the Social Services Building, to private developers. Among the proposed plans: Low-density (high-rise?) housing—up to 311 apartments. . . .

> These proposals will affect ALL of Garden City.

The Village held a subsequent public forum on October 23, 2003, where BFJ gave another PowerPoint presentation summarizing the proposed rezoning. The record indicates that at this meeting, citizens again raised questions about traffic and an increase in schoolchildren. BFJ again reiterated that traffic would be reduced relative to existing use, and that multi-family housing would generate fewer schoolchildren than the development of single-family homes. In keeping with these conclusions, in November 2003, BFJ presented an additional report to the P–Zone Committee, again confirming its proposal for the R–M zoning control that allowed for a possible 311 apartment units on the Social Services Site. The November 2003 report set forth a draft text for the rezoning.

In light of BFJ's final report, on November 20, 2003, the Garden City Village Board of Trustees unanimously accepted the P–Zone Committee's recommendation for the rezoning. In addition, on December 4, 2003, the Board made a finding pursuant to New York State's Environmental Quality Review Act that the zoning incorporated in what was now termed proposed Local Law 1–2004 would have "no impact on the environment." . . .

Starting in January 2004, three public hearings occurred in the span of one month. At the first hearing, on January 8, 2004, residents voiced concerns that multi-family housing would generate traffic, parking problems, and schoolchildren. In response, Filippon emphasized, "you have to remember that the existing use on that site now generates a certain amount of traffic, a fair amount of traffic. That use is going to be vacated. The two residential uses that are being proposed as one of the alternates, each of which on their face automatically generate far less traffic than the existing use. That is something to consider also." In addition, although assured by Garden City officials that the rezoning could result in single-family homes, one resident expressed concern that Nassau County would ultimately only sell the property to a multi-family developer in order to maximize revenue.

On January 20, 2004, the Eastern Property Owners' Association held a meeting at which Trustee Bee discussed BFJ's recommendation for the Social Services Site. A summary of the meeting reports that "Trustee Bee addressed many questions from the floor" and, in doing so, expressed the opinion that "Garden City demographically has a need for multi-family housing." Trustee Bee also reiterated that because relatively few schoolchildren resided in existing multi-family housing in Garden City, BFJ and the Board had reasonably predicted that multi-family housing would have less of an impact on schools than single-family housing. Trustee Bee "indicated he would keep an open mind but he still felt the recommended zoning changes were appropriate." In addition, Trustee Bee addressed citizen concerns about the possibility of affordable housing on the Site. In response to one question, Trustee Bee stated that "although economics would indicate that a developer would likely build high-end housing, the zoning language would also allow 'affordable' housing (as referred to by [the] resident asking the question) at the [Social Services Site]." The meeting notes further indicate that a majority 15 of the residents "who asked questions or made comments" at the meeting 16 supported restricting the rezoning of the Site to single-family homes. According to these notes, "residents wanted to preserve the single-family character of the Village. One resident in particular requested the [Eastern Property Owners' Association] Board take a firmer stand on the P–Zone issue and only support R–8 zoning, i.e. zoning for single-family housing.

On February 5, 2004, the Village held a third public hearing on the proposed rezoning. The record indicates that this hearing was well attended and much more crowded than usual. After an introduction by Trustee Bee, the meeting commenced with two presentations. First, Tom Yardley of BFJ emphasized that the proposed rezoning preserved the possibility of single-family homes, and that any multi-family housing would not result in high-rise apartments due to height and density restrictions. Second, Nassau County Executive Suozzi, the author of the County's Real Estate Consolidation Plan, emphasized the County's need to sell the Social Services Site to a private developer, as well as the benefits of developing multi-family housing on the property. During this discussion, a member of the audience interrupted Suozzi.

> Thomas Suozzi: Instead of putting commercial there or single family there, you do something right in between the two that creates a transition from the commercial area from one to the other. I guarantee you that it will be much better than what is there now, which is a building that is falling apart with a lot of problems in the building, a lot of problems going on around the building on a regular basis and a huge sea of parking. This will make it a much more attractive area for the

> property. Multi-family housing will be more likely to generate empty nesters and single people moving into the area as opposed to families that are going to create a burden on your school district to increase the burden on the school district.
>
> Unidentified Speaker: You say it's supposed to be upscale.
>
> Thomas Suozzi: It's going to be upscale. Single people and senior citizen empty nesters. If you sell your $2 million house in Garden City and you don't want to take care of the lawn anymore, you can go into . . . who lives in Wyndham for example?[*] It's a very upscale place. There's a lot of retirees that live there.

When Suozzi finished his presentation, the meeting was opened to questions from the public. The first question from the audience related to Trustee Bee's statements "last time," referring to the January 20, 2004 meeting of the Eastern Property Owners' Association.

> Lauren Davies: I'm just confused between what Mr. Suozzi said about the Social Services Building. You said you wanted it to be upscale, from what I understand from what Peter Bee said the last time is that they wanted it to be affordable housing. . . .
>
> Trustee Bee: Well, either I mis-spoke or you misheard, because I do not recollect using that phrase. If I did it was an inappropriate phrase. The idea was a place for Garden City's seniors to go when they did not wish to maintain the physical structure and cut the lawns and do all the various things. But not necessarily looking at a different style of life. In terms of economics.
>
> Thomas Suozzi: We're absolutely not interested in building affordable housing there and there is a great need for affordable housing, but Garden City is not the location. We need to build housing there. . . . We would generate more revenues to the County by selling it to upscale housing in that location. That is what we think is in the character of Garden City and would be appropriate there.
>
> Unidentified Speaker: How do you have control over what the developer does . . .
>
> Trustee Bee: Before the next speaker though, just to finish on that last remark, neither the County nor the Village is looking to create . . . so-called affordable housing at that spot.
>
> Unidentified Speaker: Can you guarantee that, that it won't be in that building?

In response to these questions, Suozzi indicated that the County "would be willing to put deed restrictions on any property that we sold" so "that it can't be anything but upscale housing." In response to further questioning, Suozzi stated "Don't take my word for it, we'll put whatever legal codifications that people want. This will not be affordable housing projects. That's number one." Gerard Fishberg, Garden City's counsel, further noted that the estimated sale prices for multi-family residential units "don't suggest affordable housing."

Throughout the remainder of the meeting, residents indicated their opposition to multi-family housing and their preference for single-family homes. One resident emphasized that the proposed multi-family development was not "in the flavor and character of what Garden City is now. Garden City started as a neighborhood of single family homes and it should remain as such. Others stated, to applause from the audience, that "we're not against residential, we're against multi-level residential. (Applause)." One resident expressed concern about the possibility of "four people or ten people in an apartment and nobody is going to know that."

In keeping with these statements, citizens repeatedly expressed concern about limiting the options of a developer. . . .

Another citizen expressed concerns about the possibility of what any multi-family housing might eventually become.

[*] [Ed. note: The ellipses in this sentence appear in the full text of the opinion.]

> Anthony Agrippina: We left a community in Queens County that started off similar, single family homes, two family homes, town houses that became—six story units. It was originally for the elderly, people who were looking to downsize. It started off that way. Right now you've got full families living in one bedroom townhouses, two bedroom co-ops, the school is overburdened and overcrowded.

In response, another resident emphasized that the only way to control such consequences was to restrict the zoning.

As at the previous meetings, residents also expressed concern about traffic and schools. County and Village officials reiterated that a transition to residential use, including multi-family housing, would generate far less traffic than the existing use of the Social Services Site.

> Thomas Suozzi: One thing that would happen is that you would have 1,000 less employees that work in that building, that would no longer be working there anymore.
>
> Sheila DiMasso: But, we would also have more traffic because of more people owning cars and leaving there in and out. As opposed to . . . [applause]
>
> Thomas Suozzi: You may want to clap for that, but that's irrational. (Applause)

In addition, Suozzi and Garden City officials tried to explain to citizens their view that the proposed multi-family housing would actually generate fewer schoolchildren than development of single-family homes.

> David Piciulo: If you have 311 units you will have more children potentially in there than 956 single family homes.
>
> Thomas Suozzi: That's not accurate. Based upon statistics, people spend their whole lives looking at this stuff. That's not true. So you may feel that way, but it's not accurate.
>
> David Piciulo: Those are statistics having to do with a national study. If you drive down into the neighborhood, the average home here has two kids. They're in the system for 15 years and you are going to have children in the system . . . let me just make a point.
>
> Gerard Fishberg: Not to argue with you, again, I don't think anybody has prejudged this. How many apartments are there in Wyndham?
>
> Michael Filippon: 312.
>
> Gerard Fishberg: How many school children are there in 312 apartments?
>
> Tom Yardley: Less than twenty.
>
> Gerard Fishberg: Less than twenty children in 312 apartments.

BFJ's Fish later testified that those residents who claimed to prefer single-family homes because of school impacts were "simply wrong."

In response to these questions Suozzi made clear that before any development project was approved at the Site, the developer would have to satisfy state environmental guidelines, including addressing concerns regarding traffic and impact on public services, such as schools. He further emphasized that these conclusions would be subject to public comment.

In March 2004, in the weeks after this meeting, a flyer began circulating around Garden City. The flyer stated, in relevant part:

> WILL GARDEN CITY PROPERTY VALUES DECREASE IF OVER 300 APARTMENTS ARE BUILT AT THE SITE OF SOCIAL SERVICES? . . .

> The Garden City Village Trustees are close to voting on how to zone this property. They might choose to zone it for multi-family housing (If Senator Balboni's current bill passes in June, as many as 30 of those apartments would be considered "affordable housing". According to this bill, "Affordable workforce housing means housing for individuals or families at or below 80% of the median income for the Nassau Suffolk primary metropolitan statistical area as defined by the Federal Department of housing and urban development." . . . NOT JUST GARDEN CITY INCOMES! . . .
>
> ISN'T OUR SCHOOL DISTRICT CROWDED ENOUGH NOW?
>
> The trustees are saying that there will be fewer additional students to the Garden City school district if there are 340 apartments or townhouses built at the "P ZONE" as opposed to 90 single family homes. HOW CAN THEY BE SURE OF THAT? ISN'T IT TRUE THAT MANY FAMILIES MOVE TO GARDEN CITY TO ASSURE THEIR CHILDREN OF A QUALITY EDUCATION? WHAT WILL BRING MORE STUDENTS, OVER 300 FAMILIES OR 90 FAMILIES?

The reference to "Senator Balboni's current bill" in the flyer related to legislation pending at the time which would impose affordable-housing requirements on developers on Long Island. The flyer reached Garden City Village Administrator Schoelle, who faxed it to Fish and at least one member of the Board of Trustees. The flyer also came to the attention of Trustee Lundquist.

At a Board meeting held on March 18, 2004, residents again raised concerns about the possibility of affordable housing at the Social Services Site. Schoelle's notes from that meeting indicate that residents expressed concern that the Balboni Bill might apply "retroactively." One resident urged decision-makers to "play it safe" with respect to the Balboni Bill and "vote for single family homes." . . .

In response to public pressure, BFJ and Garden City began modifying the rezoning proposal. In materials produced in April 2004, BFJ changed the proposal, reducing the number of multi-family units potentially available at the Social Services Site to 215. However, by a memorandum to the Board dated May 4, 2004, BFJ scrapped the proposed R–M zoning entirely. Instead, BFJ proposed rezoning the vast majority of the Social Services Site "Residential–Townhouse" ("R–T"), an entirely new zoning classification. The May 2004 proposal only preserved R– M zoning on the 3.03 acres of the Social Services Site west of County Seat Drive, and only by special permit. Thus, the development of multi-family housing would be restricted to less than 15% of the Social Services Site, and only by permit. BFJ's proposed description of the R–T zone defined "townhouse" as a "single-family dwelling unit."

Whereas the previous proposed rezoning took more than a year to come before the Board, the shift to R–T zoning moved rapidly through the Village's government. BFJ issued a final EAF for R–T rezoning in May 2004. Even though BFJ officials testified that a switch from R–M zoning to R– T zoning was a significant change, no draft EAF was ever issued for the R–T rezoning. In addition, the shift from the P– Zone to R–T zoning was proposed by the Board as Local Law No. 2–2004 and moved to a public hearing on May 20, 2004.

The Trustees further stated at this meeting that they hoped to have a final vote on the rezoning as soon as June 3, 2004, and that the bill had already been referred to the Nassau County Planning Commission. Explaining the switch, Fish offered the following rationale:

> This was, this was a conscious decision, and I think those of you who might have been at the last two . . . workshops, this was discussed in quite a bit of detail, that there was, there was a concern that if the whole 25 acres were developed for multi family it would generate too much traffic and it didn't serve, it didn't serve as a true transition. . . .
>
> So, that, the proposal has been modified where previously multi family would have been allowed in all 25 acres, as of right, the proposal's been modified so that it's no longer allowed at all as-of-right, you'd have to get a special permit for it, through the Trustees, and it is a condition of the permit is

> that it can only be to the west of County Seat Drive. So, in essence, what the Trustees have done, is they have reduced the multi family to less than 15 percent of [the] site.

At this meeting, a member of the Garden City community thanked the Board of Trustees for responding to the concerns of residents:

> My husband works twelve hour, fourteen hour days so that we can live here. We didn't inherit any money from anyone. We weren't given anything. We didn't expect anything from anyone. We worked very hard to live in Garden City because [of] what it is. And I feel like very slowly it's creeping away by the building that is going on. . . . And I just think to all of you, just keep, be strong, like, just keep Garden City what it is. That is why people want to come here. You know, it's just a beautiful, beautiful town, people would like to live here, but I just think, just think of the people who live here, why you yourselves moved here. You don't move here to live near apartments. You don't move here so that when you turn your corner there's another high-rise.

Toward the close of this meeting, a member of former Plaintiff ACORN spoke about the need for affordable housing in Nassau County and asked that Garden City consider building affordable housing. . . .

On June 3, 2004, the Garden City Board of Trustees unanimously adopted Local Law No. 2–2004 and the Social Services Site was rezoned R–T. The following month, Nassau County issued a Request for Proposals ("RFP") concerning the Social Services Site under the R–T zoning designation. The RFP stated that the County would not consider bids of less than $30 million.

Plaintiffs were unable to submit a bid meeting the specifications of the RFP. Ismene Speliotis, Executive Director of NYAHC/MHANY, analyzed the R–T zoning and concluded that it was not financially feasible to build affordable housing under R–T zoning restrictions at any acquisition price. Testifying at trial, Suozzi concurred with this assessment. . . . NYAHC and New York ACORN met with Suozzi and other County officials to discuss the possibility of including affordable housing on the Social Services Site. But the County did not reissue the RFP. . . .

The County ultimately awarded the contract to develop the Social Services Site to Fairhaven Properties, Inc. ("Fairhaven"), a developer of single-family homes, for $56.5 million, the highest bid. Fairhaven proposed the development of 87 single-family detached homes, and did not include any townhouses.

After the contract was awarded to Fairhaven, NYAHC prepared four proposals, or "pro formas," for development at the Social Services Site under the R–M zoning designation, with the percentage of affordable and/or Section 8 housing units of the 311 total rental units ranging from 15% to 25%. Plaintiffs' expert Nancy McArdle evaluated each proposal in conjunction with the racial/ethnic distribution of the available pool of renters and determined that, had NYAHC been able to build housing under any of the four proposals in accordance with the rejected R–M zoning designation, the pool of renters likely to occupy all units, including market-rate, affordable, and Section 8 units, would have likely been between 18% and 32% minority, with minority households numbering between 56 and 101. Under the proposal predicting 18% minority population, NYAHC would have been able to bid $56.1 million for the Social Services Site.

McArdle further analyzed the likely racial composition of the pool of homeowners who could afford to purchase single-family units potentially developed by Fairhaven. She determined that between three and six minority households could afford such a purchase. Thus, while the NYAHC proposals would likely increase racial diversity in Garden City, McArdle testified, the Fairhaven proposal would likely leave the racial composition of Garden City "unchanged." . . .

In finding intentional racial discrimination here, the district court applied the familiar Arlington *Heights* factors. Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another may provide an important starting point." *Arlington Heights*. But unless a "clear pattern, unexplainable on grounds other than race, emerges," *id.*, "impact alone is not determinative, and the Court must look to other evidence," *id*. Other relevant considerations for discerning a racially discriminatory intent include "the historical background of the decision . . . particularly if it reveals a series

of official actions taken for invidious purposes," "departures from the normal procedural sequence," *id.*, "substantive departures," and "the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id.*

Here, the district court premised its finding of racial discrimination primarily on two of these factors:

(1) impact, i.e. "the considerable impact that [the Village's] zoning decision had on minorities in that community"; and

(2) sequence of events, i.e. "the sequence of events involved in the Board's decision to adopt R–T zoning instead of R– M zoning after it received public opposition to the prospect of affordable housing in Garden City." The district court noted a history of racial discrimination in Garden City, but declined to place "significant weight" on this factor. Trial court opinion ("Although [past events] could tend to suggest that racial discrimination has historically been a problem in Garden City, the Court declines to place significant weight on them for various reasons.").

The district court first noted statistical evidence that the original R–M proposal would have created a pool of potential renters with a significantly larger percentage of minority households than the pool of potential renters for the zoning proposal ultimately adopted as law by Garden City. However, in making its finding of discrimination, the district court relied primarily on the sequence of events leading up to the implementation of R–T zoning. The court first noted that Garden City officials and BFJ were initially enthusiastic about R–M zoning. BFJ's proposal permitted the development of up to 311 multi-family units, and Trustee Bee expressed the opinion at a January 20, 2004 meeting that "Garden City demographically has a need for multi-family housing," and that "he would keep an open mind but he still felt the recommended zoning change were appropriate." Trial court opinion.

However, the district court concluded that BFJ and the Board abruptly reversed course in response to vocal citizen opposition to the possibility of multi-family housing, including complaints that affordable housing with undesirable residents could be built under this zoning. At a February 4, 2004 meeting, Trustee Bee stated that "neither the County nor the Village is looking to create . . . so-called affordable housing." BFJ and the Board subsequently endorsed the R–T proposal, which banned the development of multi-family housing on all but a small portion of the Social Services Site and then only by special permit.

The district court focused on the suddenness of this change. Although the P–Zone Committee had consistently recommended R–M zoning for eighteen months, R–T zoning went from proposal to enactment in a matter of weeks. The district court noted that BFJ's consideration of R–T zoning was not nearly as comprehensive and deliberative as that for R–M zoning. In addition, the court found it strange that members of the P–Zone Committee—the Village officials most familiar with the situation—were excluded from the discussions regarding R–T zoning. Indeed, after a final public presentation on the proposed R–M zoning in April 2004, Schoelle, Filippon, and Fishberg met with BFJ to review the public comments. For some unknown reason, members of the P–Zone Committee did not participate in this meeting, and neither did the Village's zoning counsel Kiernan. The district court also found it peculiar that Local Law 2–2004, adopting R–T zoning, was moved to a public hearing even though no zoning text had yet been drafted and no environmental analysis of the law's impact had been conducted. Thus, in rejecting Garden City's argument below that the adoption of R–T zoning was business as usual, the district court concluded that Garden City was "seeking to rewrite history."

Although now recognizing the oddness and abruptness of this sequence of events, Garden City argues that these facts should not raise any suspicion. The Village contends that because BFJ, the Village Trustees, and Village residents had discussed the zoning of the Site for more than a year, there was no need to spend additional time discussing the same issues once they settled on a preferable lower-density approach. While the adoption of R–T zoning may seem rushed, and appear to be an abrupt change from Garden City's prior consistent course of conduct, according to Garden City, this was actually just efficient local government. Given the amount of time already invested in studying the Social Services Site, R–T zoning could proceed more quickly through the legislative process. While this may be one reasonable interpretation of the facts, the district court was nevertheless entitled to draw the contrary inference that the abandonment of R–M zoning was an abrupt change and that the "not nearly as deliberative" adoption of R–T zoning was suspect. Indeed, it is a bedrock principle that "where there are two permissible views of the evidence, the

factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

In considering the sequence of events leading up to the adoption of R–T zoning, the district court also focused closely on the nature of the citizen complaints regarding R– M zoning. Citizens expressed concerns about R–M zoning changing Garden City's "character" and "flavor." In addition, contrary to Garden City's contentions that any references to affordable housing were isolated, citizens repeatedly and forcefully expressed concern that R– M zoning would be used to introduce affordable housing and associated undesirable elements into their community. Residents expressed concerns about development that would lead to "sanitation [that] is overrun," "full families living in one bedroom townhouses, two bedroom co-ops" and "four people or ten people in an apartment." Other residents requested that officials "guarantee" that the housing would be "upscale" because of concerns "about a huge amount of apartments that come and depress the market for any co-op owner in this Village."

The district court also noted Garden City residents' concerns about the Balboni Bill and the possibility of creating "affordable housing," specifically discussing a flyer warning that property values might decrease if apartments were built on the Site and that such apartments might be required to include affordable housing under legislation pending in the State legislature. This flyer came to the attention of at least two trustees, as well as Fish and Schoelle. Concerned about the Balboni Bill, Garden City residents urged the Village officials to "play it safe" and "vote for single family homes." Viewing this opposition in light of (1) the racial makeup of Garden City, (2) the lack of affordable housing in Garden City, and (3) the likely number of minorities that would have lived in affordable housing at the Social Services Site,—the district court concluded that Garden City officials' abrupt change of course was a capitulation to citizen fears of affordable housing, which reflected race-based animus.

We find no clear error in the district court's determination. The tenor of the discussion at public hearings and in the flyer circulated throughout the community shows that citizen opposition, though not overtly race-based, was directed at a potential influx of poor, minority residents. Indeed, the description of the Garden City public hearing is eerily reminiscent of a scene described by the Court in [an earlier, unrelated, case, *United States v. Yonkers Bd of Education*, 837 F.2d 1181 (2nd Cir 1987), involving public housing]:

> At the meeting . . . the predominantly white audience overflowed the room. The discussion was emotionally charged, with frequent references to the effect that subsidized housing would have on the "character" of the neighborhood. The final speaker from the audience . . . stated that the Bronx had been ruined when blacks moved there and that he supported the condominium proposal because he did not want the same thing to happen in Yonkers.

Yonkers. Although no one used explicitly racial language at the Garden City public hearing, the parallels are striking. Like the residents in Yonkers, Garden City residents expressed concern that R–M zoning would change the "flavor" and "character" of Garden City. Citizens requested restricting the Site's zoning to single-family homes in order to preserve "the flavor and character of what Garden City is now." Citizens repeatedly requested "guarantees" that no affordable housing would be built at the Social Services Site and that the development would only be "upscale." Expressing concerns about the sort of residents who might occupy an eventual complex, one resident feared that the proposed development "could have four people or ten people in an apartment and nobody is going to know that." And, as with the emotionally charged scene in Yonkers, Suozzi stated that citizens at the public hearing were "yelling at him." Finally, recalling the Yonkers resident who spoke regarding the Bronx being "ruined," one resident explained that he had left Queens because apartment buildings originally intended for the elderly resulted in "full families living in one bedroom townhouses, two bedroom co-ops, the school is overburdened and overcrowded. You can't park your car. The sanitation is overrun." Another resident stated that she had left Brooklyn to avoid exactly the sort of development potentially available for the Social Services Site.

The district court concluded that, in light of the racial makeup of Garden City and the likely number of members of racial minorities that residents believed would have lived in affordable housing at the Social Services Site, these comments were code words for racial animus. See *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074 (3d Cir.1996) (observing that it "has become easier to coat various forms of discrimination with the appearance of propriety" because the threat of liability takes that which was once overt and makes it subtle). "Anti-discrimination laws and lawsuits

have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare. . . . Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms." *Id.* "Racially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Smith v. Fairview Ridges Hosp*., 625 F.3d 1076 (8th Cir.2010).

Empirical evidence supports the reasonableness of the district court's conclusion. Indeed, "research suggests that people believe that the majority of public housing residents are people of color, specifically, African American." See Carol M. Motley & Vanessa Gail Perry, Living on the Other Side of the Tracks: An Investigation of Public Housing Stereotypes, 32 *J. Pub. Pol'y & Marketing* 48 (2013); see also *id.* ("In the United States, public housing residents are perceived as predominantly ethnic peoples (mainly African American). . . ."). Here, the comments of Garden City residents employ recognized code words about low-income, minority housing. For example, "opponents of affordable housing provide subtle references to immigrant families when they condemn affordable housing due to the fear it will bring in 'families with lots of kids.'" Mai Thi Nguyen, Victoria Basolo & Abhishek Tiwari, Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors, 30 *Housing, Theory & Soc'y* 107 (2013). Here, invoking this stereotype, Garden City residents complained of "full families living in one bedroom townhouses," and "four people or ten people in an apartment," as well as the possibility of "overburdened and overcrowded" schools. In addition, research shows that "opponents of affordable housing may mention that they do not want their city to become another 'Watts' or 'Bayview–Hunters–Point,' both places with a predominantly African–American population." Nguyen, at 123. So too here, Garden City residents expressed concerns about their community becoming like communities with majority-minority populations, such as Brooklyn and Queens. Moreover, "a series of studies have shown that when Whites are asked why they would not want to live near African–Americans (no income level is indicated in the question), common responses relate to the fear of property value decline, increasing crime, decreasing community quality (e.g. physical decay of housing, trash in neighborhood, and unkempt lawns) and increasing violence." Nguyen. Repeatedly expressing concerns that R–M zoning would lead to a decline in their property values as well as reduced quality of life in their community, Garden City residents urged the Board of Trustees to "keep Garden City what it is" and to "think of the people who live here." Considering these statements in context, we find that the district court's conclusion that citizen opposition to R–M zoning utilized code words to communicate their race-based animus to Garden City officials was not clearly erroneous. See *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir.1982) (finding "'camouflaged' racial expressions" based on concerns "about an influx of 'undesirables,'" who would "'dilute' the public schools"). While another factfinder might reasonably draw the contrary inference from these facially neutral statements, "the district court's account of the evidence is plausible in light of the record viewed in its entirety."

In response, Garden City notes that its officials testified that they did not understand the citizen opposition to be race-based. But, quite obviously, discrimination is rarely admitted. See *Rosen v. Thornburgh*, 928 F.2d 528 (2d Cir.1991) ("A victim of discrimination is . . . seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence."); *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir.1999) ("An employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."). The district court reached its conclusion after a lengthy trial, during which the court had the opportunity to hear and evaluate the testimony of numerous witnesses, including all of the relevant Garden City officials. Moreover, there is ample evidence from which to question the credibility of these officials. Trustee Lundquist stated during his trial testimony that he was unsure if Garden City—an overwhelmingly white community—was majority black. Similarly, Building Superintendent Filippon stated that he did not know if Garden City was majority white. Trustee Negri further stated that he could not recall if he had ever had a conversation about affordable housing.

In addition to these incredible statements, which the district court would have been entitled to discredit, there was abundant evidence from which the district court could find that Garden City officials clearly understood residents' coded objections to R–M zoning. During his testimony, Village Administrator Schoelle indicated that he knew low-income residents of Garden City were primarily African Americans and Latinos. In addition, County Executive Suozzi testified to his knowledge that race is generally a factor in opposition to affordable housing in Nassau County, and

that Garden City residents' opposition to affordable housing was motivated, at least in part, by discriminatory animus. Furthermore, employing the code words apparently employed by Garden City residents, Trustee Negri testified that housing occupied by low-income minorities is not consistent with the "character" of Garden City.

Garden City's argument appears to boil down to the following—because no one ever said anything overtly race-based, this was all just business as usual. But the district court was entitled to conclude, based on the Arlington Heights factors, that something was amiss here, and that Garden City's abrupt shift in zoning in the face of vocal citizen opposition to changing the character of Garden City represented acquiescence to race-based animus. . . .

Note: Applying the Intent Requirement

1. What do you think about the appellate court's application of the *Arlington Heights* factors? Note how carefully the appellate court phrases its task in reviewing the trial court's findings about intent. What does that care—and the review suggested by that standard—suggest about the intent requirement?

2. The court's opinion notes that, today, discrimination is usually not explicit—that is, there are relatively few situations where the government expressly excludes persons based on their race. (The major exception is in affirmative action cases, where the government asserts that its race consciousness was justified by benign goals.) Regardless of whether you agree or disagree with the *Arlington Heights* factors, how would you guide courts' determinations of whether a given government action, while neutral on its face, was nevertheless motivated by a desire to classify on some suspicious ground, such as race or sex?

3. Consider the intent requirement itself, apart from questions about how to apply it. While no justice expressly dissented from *Davis*'s announcement of that requirement, some scholars have sharply criticized it. They call instead for some version of an effects test, in which disparate results on the alleged ground (*e.g.*, race) triggers more searching judicial review without a formal inquiry into whether that disparate impact was the result of intentional government action. Do you agree with Justice White's objection in *Davis* that an effects test would necessarily be unmanageable? How did the *Mhany* court's application of the intent test deal with the disparate impact of the town's zoning decision? Is it accurate to say that that court did in fact apply something akin to a modified effects test?

Chapter 15: Equal Protection Analysis Today

Insert at the end of Page 950, before the Note:

Note: Animus in the Court's 2017-2018 Term

1. Since *Windsor*, the Supreme Court has not decided an equal protection case based on animus reasoning. However, in its 2016-2017 term, the Court did decide two cases that featured claims of animus-based government action in contexts other than equal protection.

2. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018), the Court considered a claim that the Colorado Civil Rights Commission violated the rights of a baker who refused to make a cake that a same-sex couple requested to celebrate their wedding. Under Colorado law, places of "public accommodation," such as stores and theaters, could not discriminate on a variety of grounds, including sexual orientation. The baker's cakeshop fell within the statutory definition of a public accommodation. However, the baker argued that his refusal was based on his religious objection to same-sex marriage, which he claimed he would have to abandon were he required to make the cake. He insisted that he would be happy to provide the couple with other baked goods, but not with a wedding cake, since providing that product would, in his view, signal his endorsement of a wedding that he did not view as religiously authentic. He thus argued that applying the Colorado law to him under these circumstances violated his rights under the First Amendment's Free Exercise Clause, which prohibited government (including state) action that "prohibit[s] the free exercise" of religion.

As presented, *Masterpiece* presented the Court with a difficult choice between respecting, on the one hand, the religious exercise rights of persons like the baker and the authority of states to ensure equal access to goods and services in the marketplace. (Note that this equal access is statutory in nature; because establishments like the bakery are not state actors, they are not subject to the requirements of the Equal Protection Clause. The "state action" doctrine is covered in Chapter 18.) The baker's Free Exercise Clause claim was governed by a rule that prohibited government action that reflected hostility to religion.

3. The Court ruled for the baker on a 7-2 vote. However, writing for six of those justices, Justice Kennedy wrote a narrow opinion that focused in part on particular comments made by members of the state commission that heard the discrimination claim. According to Justice Kennedy, those comments reflected the hostility to religion that the Free Exercise Clause prohibited. In particular, he cited comments suggesting that the baker would "need to compromise" if he wanted to continue doing business in the state. While he conceded that these comments could be read in different ways, he also cited the following comment at a later commission hearing on the case:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations

> where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Justice Kennedy concluded that this comment made clear that the commission's deliberations contained "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." That hostility, he concluded violated what he described as the Free Exercise Clause's requirement that the state give "neutral and respectful consideration" of his religious objections to complying with the law in this situation.

4. Justices Gorsuch and Kagan both joined the majority opinion, and each wrote separate concurrences. Justice Thomas concurred in the judgment.

Justice Ginsburg, joined by Justice Sotomayor, dissented. Discussing these comments, she wrote the following:

> Statements made at the Commission's public hearings on Phillips' [the baker's] case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins [the same-sex couple]. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, [a] Division [of the Commission] had to find probable cause that Phillips violated [the Colorado public accommodations law]. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council.

5. Later that same term, the Court decided *Trump v. Hawaii*, 138 S.Ct. 2392 (2018). *Hawaii* dealt with the third iteration of President Trump's executive order restricting immigration from several countries, most of which were majority-Muslim. As relevant here, the plaintiffs alleged that the executive order violated the First Amendment prohibition on government "establish[ing]" a church, because it was based on anti-Muslim hostility. The plaintiffs argued that statements made by the President, both while in office and as a candidate, reflected "animus" toward Islam and Muslims. Several lower courts agreed.

6. By a 5-4 vote, the Court sided with the President. Writing for the majority, Chief Justice Roberts relied heavily on the deference owed the President in the realm of national security and the admission of aliens into the country. He acknowledged that the Court has engaged in some level of relatively deferential review of such presidential decisions, which he characterized as "rational basis" review.

Applying that review, he then wrote: "Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.' *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973) [Note *supra.* this chapter]." He then

discussed *Cleburne* and *Romer*, describing the latter as a case where the law in question "was 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and where 'its sheer breadth [was] so discontinuous with the reasons offered for it' that the [law] seemed 'inexplicable by anything but animus.'" Applying these principles, the Chief Justice then wrote:

> The [presidential] Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." . . . [B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

He found that "persuasive evidence" in the planning that he said underlay the challenged order, and its nuances and limitations. He concluded that those features of the order reflected its foundation in legitimate security concerns, rather than anti-Muslim animus.

7. Justice Kennedy concurred, suggesting that government officials had duties to avoid animus-based statements and action even when they were not subject to meaningful judicial review. Justice Breyer joined by Justice Kagan, dissented. He noted that the majority cited the order's provisions for case-by-case waivers as evidence of the order's careful tailoring and grounding in legitimate national security concerns. But he also noted evidence that such waivers were never, or very rarely, granted. He would have remanded the case to the lower courts to determine whether such waivers were a real feature of the order, a determination that he suggested would help determine the order's grounding in legitimate national security concerns rather than simple animus.

8. Justice Sotomayor, joined by Justice Ginsburg, also dissented. She observed that the Establishment Clause forbade government action that a reasonable observer would believe was enacted for the purpose of disfavoring a religion. She then wrote:

> In answering [the reasonable observer/disfavoring] question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decisionmaker. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993). At the same time, however, courts must take care not to engage in "any judicial psychoanalysis of a drafter's heart of hearts."

After recounting the statements made by candidate- and then President Trump, Justice Sotomayor then stated: "Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications." She took issue with the Court's application of rational basis review, but then stated:

> But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "'inexplicable by anything but animus.'" *Ante* (quoting *Romer v. Evans* (1996) [*Supra.* this chapter]); *see also Cleburne v. Cleburne Living Center, Inc.*, (1985) [*Supra.* this

> chapter] (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group).

She supported her claim by arguing that, despite its facial neutrality, the order overwhelmingly targeted Muslim immigrants, by casting doubt on the fairness of the officials who developed the order, questioning the rigor of the administrative process that led to the order, and questioning the need for the order in light of other actions the government had taken to protect against terrorists entering the country. She concluded this part of her analysis with the following paragraph:

> In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

She then reminded readers of the Court's opinion in *Masterpiece* and argued that "Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant."

9. Consider *Masterpiece* and *Hawaii*. How did the justices in these cases view animus? How did they go about determining whether animus was present and, if so, whether that animus required the invalidation of the challenged government action? In particular, "how much" animus had to be present, and to what degree did it have to influence the government's decision to act?

10. Why do you think Chief Justice Roberts in *Hawaii* cited *Cleburne* and *Romer*, but not *United States v. Windsor*, the most recent of the equal protection animus cases? How do you think these cases should influence the Court's equal protection/animus jurisprudence? Consider, finally, that Justice Kennedy, who wrote *Romer* and *Windsor*, retired from the Court after the 2016-2017 term. What do you think the fate of "animus doctrine" will be? What do you think it *should* be?

Chapter 16: Equal Protection Fundamental Rights

Insert at the end of Page 963, before the Note:

Note: Tiered Scrutiny—A Dissent from Justice Thomas

In *Whole Woman's Health Center v. Hellerstedt*, 136 S.Ct. 2292 (2016) (excerpted in Chapter 9 of this Supplement), the Court applied the undue burden standard of *Planned Parenthood of Southeast Pa. v. Casey* (1992) (*Supra* Chapter 9) to invalidate a Texas law regulating abortion providers. Among the three dissenters, Justice Thomas wrote a dissent only for himself. Most of that dissent critiqued the Court's application of *Casey*, as well as *Casey* itself. But part of his opinion consisted of a more general attack on the entire idea of tiers of scrutiny, including *Casey*'s undue burden standard but also more generally. An excerpt of that opinion follows.

III

> 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 meaningless 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. *Roe v. Wade* (1973) [*Supra* Chapter 9], then applied strict scrutiny to a purportedly "fundamental" substantive due process right for the first time. Then the tiers of scrutiny proliferated into ever more gradations. See, *e.g.*, *Craig v. Boren* (1976) [*Supra* Chapter 12] (intermediate scrutiny for sex-based classifications); *Lawrence v. Texas* (2003) (O'Connor, J., concurring in judgment) [Note *supra* this Chapter] ("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 (1976) (*per curiam*) (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. (1996) (Scalia, J., dissenting) [*Supra* Chapter 12]. 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.*; see also *Craig* (Rehnquist, J., dissenting).
>
> 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 "cultivation [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* (2016) [*Supra* Chapter 13 Supplement]. 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 (WD Tex.2014) (noting conflict in expert testimony about abortion safety). 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. Compare *Williams–Yulee v. Florida Bar*, 575 U.S. ___ (2015), with *United States v. Windsor*, 570 U.S. 744 (2013) [Note *supra* this Chapter].

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, *McGowan v. Maryland*, 366 U.S. 420 (1961)—with formidable toughness. *E.g.*, *Lawrence* (O'Connor, J., concurring in judgment) (at least in equal protection cases, the Court is "most likely" to find no rational basis for a law if "the challenged legislation inhibits personal relationships"); see *id.* (Scalia, J., dissenting) (faulting the Court for applying "an unheard-of form of rational-basis review").

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* (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.

IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe v. Wade* (1973) [*Supra* Chapter 9] as the tipping point that transformed . . . the tiers of scrutiny into an unworkable 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* (1905) [*Supra* Chapter 7]. The Court in 1937 repudiated *Lochner*'s foundations. See *West Coast Hotel Co. v. Parrish* (1937) [*Supra* Chapter 7]. 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 (1938) [Note *supra* this Chapter]. Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. 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." 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."

> 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*, 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 . . . . 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.

You've now read several different sets of materials that employ tiers of scrutiny: the dormant Commerce Clause materials of Chapter 5, the suspect class materials of Chapter 12, the racial classification materials of Chapter 13, the rational basis-plus/animus materials of Chapter 15, the fundamental rights strand of equal protection materials of Chapter 16, and the abortion and due process materials of, respectively, Chapters 9 and 10 that Justice Thomas's dissent specifically addressed. What do you think of his critique?

Part V: General Fourteenth Amendment Issues

Chapter 18: The Problem of "State Action"

D. Cross-Cutting State Action Issues

***Insert at page 1061, before the Note*:**

Manhattan Community Access Corp. v. Halleck
139 S.Ct. 1921 (2019)

Justice KAVANAUGH delivered the opinion of the Court.

. . . This state-action case concerns the public access channels on Time Warner's cable system in Manhattan. Public access channels are available for private citizens to use. The public access channels on Time Warne's cable system in Manhattan are operated by a private nonprofit corporation known as MNN. The question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels. In other words, is operation of public access channels on a cable system a traditional, exclusive public function? If so, then the First Amendment would restrict MNN's exercise of editorial discretion over the speech and speakers on the public access channels.

Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion. . . .

I

A

Since the 1970s, public access channels have been a regular feature on cable television systems throughout the United States. . . . The New York State Public Service Commission regulates cable franchising in New York State and requires cable operators in the State to set aside channels on their cable systems for public access. State law requires that use of the public access channels be free of charge and first-come, first-served. Under state law, the cable operator operates the public access channels unless the local government in the area chooses to itself operate the channels or designates a private entity to operate the channels.

Time Warner (now known as Charter) operates a cable system in Manhattan. Under state law, Time Warner must set aside some channels on its cable system for public access. New York City (the City) has designated a private nonprofit corporation named Manhattan Neighborhood Network, commonly referred to as MNN, to operate Time Warner's public access channels in Manhattan. This case involves a complaint against MNN regarding its management of the public access channels.

B

Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true. [This lawsuit involved two persons, which the opinion refers to as "the producers," who produced a film about MNN's alleged neglect of some of its service area, which MNN aired on the public access station. After receiving viewer complaints about the film, and after other disputes with them, MNN ultimately suspended the producers from MNN's services and facilities. The producers sued, alleging that MNN had deprived them of their First Amendment rights.]

MNN moved to dismiss the producers' First Amendment claim on the ground that MNN is not a state actor and therefore is not subject to First Amendment restrictions on its editorial discretion. The District Court agreed with

MNN and dismissed the producers' First Amendment claim. The Second Circuit reversed in relevant part [with one judge dissenting].

We granted certiorari to resolve disagreement among the Courts of Appeals on the question whether private operators of public access cable channels are state actors subject to the First Amendment.

II

. . . In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. See *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) [*Supra.* this Chapter]. By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty.

. . . Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, see, e.g., *Jackson v. Metropolitan Edison* (1974) ([*Supra.* this Chapter]; (ii) when the government compels the private entity to take a particular action, see, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982); or (iii) when the government acts jointly with the private entity, see, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

The producers' primary argument here falls into the first category: The producers contend that MNN exercises a traditional, exclusive public function when it operates the public access channels on Time Warner's cable system in Manhattan. We disagree.

A

Under the Court's cases, a private entity may qualify as a state actor when it exercises "powers traditionally exclusively reserved to the State." *Jackson*. It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function. See *Rendell-Baker v. Kohn* (1982) [*Supra.* this Chapter]; *Jackson*; *Evans v. Newton*, 382 U.S. 296 (1966).

The Court has stressed that "very few" functions fall into that category. Under the Court's cases, those functions include, for example, running elections and operating a company town. See *Terry v. Adams*, 345 U.S. 461 (1953) (elections); *Marsh v. Alabama* (1946) [*Supra.* this Chapter] (company town); *Smith v. Allwright*, 321 U.S. 649 (1944) (elections); *Nixon v. Condon*, 286 U.S. 73 (1932) (elections). The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity.

The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government. . . . Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries. . . .

In short, operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases.

B

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

That analysis mistakenly ignores the threshold state-action question. When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content.

By contrast, when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum. This Court so ruled in its 1976 decision in *Hudgens v. NLRB*. There, the Court held that a shopping center owner is not a state actor subject to First Amendment requirements such as the public forum doctrine. 424 U.S. 507 (1976) [Note *supra.* this Chapter].

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

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

If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether. . . .

C

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

New York City's designation of MNN to operate the public access channels is analogous to a government license, a government contract, or a government-granted monopoly. But as the Court has long held, the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function. See, e.g., *Rendell-Baker* (contracts); *Jackson* (electric monopolies); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (liquor licenses) [Note *supra.* this Chapter]. The same principle applies if the government funds or subsidizes a private entity. See *Rendell-Baker*.

Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities. As this Court's many state-action cases amply demonstrate, that is not the law. Here, therefore, the City's designation of MNN to operate the public access channels on Time Warner's cable system does not make MNN a state actor.

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

In *Jackson v. Metropolitan Edison Co.*, the leading case on point, the Court stated that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." In that case, the Court held that

"a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory," was not a state actor. The Court explained that the "mere existence" of a "regulatory scheme"—even if "extensive and detailed"—did not render the utility a state actor. Nor did it matter whether the State had authorized the utility to provide electric service to the community, or whether the utility was the only entity providing electric service to much of that community.

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

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

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

III

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

The short answer to that argument is that the public access channels are not the property of New York City. Nothing in the record here suggests that a government (federal, state, or city) owns or leases either the cable system or the public access channels at issue here. Both Time Warner and MNN are private entities. Time Warner is the cable operator, and it owns its cable network, which contains the public access channels. MNN operates those public access channels with its own facilities and equipment. The City does not own or lease the public access channels, and the City does not possess a formal easement or other property interest in those channels. The franchise agreements between the City and Time Warner do not say that the City has any property interest in the public access channels. On the contrary, the franchise agreements expressly place the public access channels "under the jurisdiction" of MNN. Moreover, the producers did not allege in their complaint that the City has a property interest in the channels. And the producers have not cited any basis in state law for such a conclusion. Put simply, the City does not have "any formal easement or other property interest in those channels."

It does not matter that a provision in the franchise agreements between the City and Time Warner allowed the City to designate a private entity to operate the public access channels on Time Warner's cable system. Time Warner still owns the cable system. And MNN still operates the public access channels. To reiterate, nothing in the franchise agreements suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system.

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

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

* * *

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

MNN is a private entity that operates public access channels on a cable system. Operating public access channels on a cable system is not a traditional, exclusive public function. A private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. Under the text of the Constitution and our precedents, MNN is not a state actor subject to the First Amendment. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

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

The Court tells a very reasonable story about a case that is not before us. I write to address the one that is.

This is a case about an organization appointed by the government to administer a constitutional public forum. (It is not, as the Court suggests, about a private property owner that simply opened up its property to others.) New York City (the City) secured a property interest in public-access television channels when it granted a cable franchise to a cable company. State regulations require those public-access channels to be made open to the public on terms that render them a public forum. The City contracted out the administration of that forum to a private organization, petitioner Manhattan Community Access Corporation (MNN). By accepting that agency relationship, MNN stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other.

I

A

A cable-television franchise is, essentially, a license to create a system for distributing cable TV in a certain area. It is a valuable right, usually conferred on a private company by a local government. A private company cannot enter a local cable market without one.

Cable companies transmit content through wires that stretch "between a transmission facility and the television sets of individual subscribers." Creating this network of wires is a disruptive undertaking that "entails the use of public rights-of-way and easements."

New York State authorizes municipalities to grant cable franchises to cable companies of a certain size only if those companies agree to set aside at least one public access channel. New York then requires that those public-access channels be open to all comers on "a first-come, first-served, nondiscriminatory basis." Likewise, the State prohibits both cable franchisees and local governments from "exercis[ing] any editorial control" over the channels, aside from regulating obscenity and other unprotected content.

B

Years ago, New York City (no longer a party to this suit) and Time Warner Entertainment Company (never a party to this suit) entered into a cable-franchise agreement. Time Warner received a cable franchise; the City received public-access channels. The agreement also provided that the public-access channels would be operated by an

independent, nonprofit corporation chosen by the Manhattan borough president. But the City, as the practice of other New York municipalities confirms, could have instead chosen to run the channels itself.

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

II

I would affirm the judgment below. The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.

A

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

On the one hand, there are "public forums," or settings that the government has opened in some way for speech by the public (or some subset of it). The Court's precedents subdivide this broader category into various subcategories, with the level of leeway for government regulation of speech varying accordingly. But while many cases turn on which type of "forum" is implicated, the important point here is that viewpoint discrimination is impermissible in them all.

On the other hand, there are contexts that do not fall under the "forum" rubric. For one, there are contexts in which the government is simply engaging in its own speech and thus has freedom to select the views it prefers. In addition, there are purely private spaces, where the First Amendment is (as relevant here) inapplicable. The First Amendment leaves a private store owner (or homeowner), for example, free to remove a customer (or dinner guest) for expressing unwanted views. In these settings, there is no First Amendment right against viewpoint discrimination.

Here, respondents alleged viewpoint discrimination. So a key question in this case concerns what the Manhattan public-access channels are: a public forum of some kind, in which a claim alleging viewpoint discrimination would be cognizable, or something else, such as government speech or purely private property, where picking favored viewpoints is appropriately commonplace. Neither MNN nor the majority suggests that this is an instance of government speech. This case thus turns first and foremost on whether the public-access channels are or are not purely private property.

1

This Court has not defined precisely what kind of governmental property interest (if any) is necessary for a public forum to exist. I assume for the sake of argument in this case that public-forum analysis is inappropriate where the government lacks a "significant property interest consistent with the communicative purpose of the forum."

Such an interest is present here. As described above, New York State required the City to obtain public-access channels from Time Warner in exchange for awarding a cable franchise. The exclusive right to use these channels (and, as necessary, Time Warner's infrastructure) qualifies as a property interest, akin at the very least to an easement. . . .

"A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." Rights to exclude and to use are two of the most crucial sticks in the bundle.

"State law determines . . . which sticks are in a person's bundle," and therefore defining property itself is a state-law exercise. As for whether there is a sufficient property interest to trigger First Amendment forum analysis, related precedents show that there is.

As noted above, there is no disputing that Time Warner owns the wires themselves. If the wires were a road, it would be easy to define the public's right to walk on it as an easement. Similarly, if the wires were a theater, there would be no question that a government's long-term lease to use it would be sufficient for public-forum purposes. But some may find this case more complicated because the wires are not a road or a theater that one can physically occupy; they are a conduit for transmitting signals that appear as television channels. In other words, the question is how to understand the right to place content on those channels using those wires.

The right to convey expressive content using someone else's physical infrastructure is not new. To give another low-tech example, imagine that one company owns a billboard and another rents space on that billboard. The renter can have a property interest in placing content on the billboard for the lease term even though it does not own the billboard itself.

The same principle should operate in this higher tech realm. Just as if the channels were a billboard, the City obtained rights for exclusive use of the channels by the public for the foreseeable future; no one is free to take the channels away, short of a contract renegotiation. The City also obtained the right to administer, or delegate the administration of, the channels. The channels are more intangible than a billboard, but no one believes that a right must be tangible to qualify as a property interest. . . .

I do not suggest that the government always obtains a property interest in public-access channels created by franchise agreements. But the arrangement here is consistent with what the Court would treat as a governmental property interest in other contexts. New York City gave Time Warner the right to lay wires and sell cable TV. In exchange, the City received an exclusive right to send its own signal over Time Warner's infrastructure—no different than receiving a right to place ads on another's billboards. Those rights amount to a governmental property interest in the channels, and that property interest is clearly "consistent with the communicative purpose of the forum." Indeed, it is the right to transmit the very content to which New York law grants the public open and equal access.

2

With the question of a governmental property interest resolved, it should become clear that the public-access channels are a public forum. . . .

B

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

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

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

Not all acts of governmental delegation necessarily trigger constitutional obligations, but this one did. New York State regulations required the City to secure public-access channels if it awarded a cable franchise. The City did award a cable franchise. The State's regulations then required the City to make the channels it obtained available on

a "first-come, first-served, nondiscriminatory basis." That made the channels a public forum. Opening a public forum, in turn, entailed First Amendment obligations.

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

III

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

A

The majority's explanation for why there is no governmental property interest here does not hold up. . . .

B

More fundamentally, the majority's opinion erroneously fixates on a type of case that is not before us: one in which a private entity simply enters the marketplace and is then subject to government regulation. The majority swings hard at the wrong pitch.

The majority focuses on *Jackson v. Metropolitan Edison Co.*, which is a paradigmatic example of a line of cases that reject [constitutional] liability for private actors that simply operate against a regulatory backdrop. *Jackson* emphasized that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." Thus, the fact that a utility company entered the marketplace did not make it a state actor, even if it was highly regulated. The same rule holds, of course, for private comedy clubs and grocery stores.

The *Jackson* line of cases is inapposite here. MNN is not a private entity that simply ventured into the marketplace. It occupies its role because it was asked to do so by the City, which secured the public-access channels in exchange for giving up public rights of way, opened those channels up (as required by the State) as a public forum, and then deputized MNN to administer them. That distinguishes MNN from a private entity that simply sets up shop against a regulatory backdrop. . . .

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

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

The majority . . . suggests that West is different because "the State was constitutionally obligated to provide medical care to prison inmates." But what the majority ignores is that the State in *West* had no constitutional obligation to open the prison or incarcerate the prisoner in the first place; the obligation to provide medical care arose when it made those prior choices.

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

. . . [T]he majority hastens to qualify its decision and to cabin it to the specific facts of this case. Those are prudent limitations. Even so, the majority's focus on *Jackson* still risks sowing confusion among the lower courts about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution. . . .

Note: The State Action Analysis in *Manhattan Community Access*

1. The Court has long cautioned that state action analysis is unusually fact-intensive and resistant to broadly applicable general rules. *See, e.g.*, *Burton v. Wilmington Parking Authority* (1961) (*Supra.* this Chapter) ("[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task which This Court has never attempted. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."). The majority acknowledges this reality, as does Justice Sotomayor. For this reason, state action cases require you to be particularly attentive to the facts of each case.

2. Nevertheless, one can detect in court opinions particular tones or attitudes about the state action issue. Clearly, the majority is less sympathetic than the dissent to the state action claim in *Manhattan Community Access*. How does the majority present its analysis so as to reflect its resistance to finding state action?

Justice Sotomayor has her own concerns, which she sets forth at the end of the excerpt from her dissent. Assume that the Court should be concerned about the government "outsourcing" she describes. What criteria would you suggest for determining whether the recipient of such outsourcing must comply with the Constitution?

3. What are the stakes in state action cases? Is it always preferable for parties to be subject to the Constitution if there's even a plausible state action argument? Or are there countervailing concerns about applying the Constitution to too many ostensibly private actors? If you think the answer to the state action question should be somewhere in the middle, is there any way for legal doctrine to achieve an appropriate balance?

Problem: Postal Services in a Church Building

The following is an excerpt of a case in which a plaintiff alleged that the United States Postal Service, a government entity, violated the First Amendment's prohibition on government establishment of religion when it entered into an agreement with a church organization to host and operate a "Contract Postal Unit" (which, as you'll read below, is essentially a satellite post office). As you'll see, it was the private church organization that was actually expressing religious views; nevertheless, the plaintiff claimed that the Postal Service's involvement with that organization,

and the organization's performance of mailing functions, was such that the church's religious expression should be imputed to the federal government.

This excerpt presents the facts of this case. How do you think the court in this case should have analyzed the state action issue?

A. THE POSTAL SERVICE AND CONTRACT POSTAL UNITS (CPUs).

The Postal Service . . . acts as an independent establishment of the executive branch of the federal government. The general duties of the Postal Service are to plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees, and to receive, transmit, and deliver written and printed matter and parcels throughout the United States and the world. See 39 U.S.C. § 403. Congress has bestowed the Postal Service with the power "to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable."

In certain circumstances, the Postal Service enters into contracts establishing CPUs, which are distinguishable from traditional, government-run "official" post offices (also known as "classified units") staffed and operated by Postal Service employees. The Postal Service's Glossary of Postal Terms defines a CPU as

> "a postal unit that is a subordinate unit within the service area of a main post office. It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, postal money order or registered mail)."

CPUs are operated by persons who are not postal employees. CPUs are not permitted to provide products from competing services such as Federal Express or the United Parcel Service, but they may conduct non-postal business on the premises in an area that is separate and distinct from the postal products. All postal funds must be kept separate from the non-postal funds.

The Postal Service relies upon CPUs to bring postal services to areas in which the Postal Service has determined that the establishment of a classified unit would be unfeasible. There are approximately 5,200 CPUs nationwide, and they are currently operated in, among other places, colleges, grocery stores, pharmacies, quilting shops, and private residences. . . .

Each CPU has a contracting officer representative appointed to oversee that CPU. The contracting officer representative is responsible for administering the contract. Once a CPU contract has been awarded, the contracting officer representative has the responsibilities of conducting on-site reviews, performing an annual review of the CPU's bond, conducting periodic financial reviews with an annual audit, and reviewing the operating/service hours at the CPU. There is no required schedule that a contracting officer representative must keep with regard to a CPU, although he must conduct on-site reviews "periodically."

B. THE SINCERELY YOURS, INC. CONTRACT POSTAL UNIT

. . . Before the CPU contract [at issue in this case] was awarded to the Church . . . , the Town of Manchester had two prior CPUs in operation, the Weston Pharmacy CPU and the Community Place CPU . . . . Boyne [the postmaster for that community] was the contracting officer representative for the Community Place CPU from 1998 through October 2001, when the Community Place CPU closed.

. . . There was substantial community interest generated by this closing, as the community sought to find a suitable replacement. . . . [On] November 20, 2001, the Postal Service awarded the CPU contract to the Church. . . . On October 9, 2003, the Church and the Postal Service modified the CPU contract by replacing the Church with [Sincerely Yours, Inc. (SYI)], a corporation set up by the Church for the purpose of establishing the CPU, and SYI began to run the CPU ("the SYI CPU").

Pursuant to the terms of the SYI CPU contract, the interior and exterior of the SYI CPU premises are to be kept clean, neat, uncluttered, and in good repair. The SYI CPU must contain signage indicating that the establishment is a contract postal unit and providing the address of the nearest Postal Service Administrative Office. All money collected at the SYI CPU is the property of the Postal Service, and all payments to SYI by the Postal Service are made in arrears after each Postal Service accounting period. As part of the SYI CPU contract, the Postal Service was required to pay for, among other things, the build-out of the SYI CPU counter and the construction of post office boxes at the SYI CPU. SYI was to pay for all other renovations to the building that housed the SYI CPU. Under the terms of the SYI CPU contract, SYI receives, as compensation, 18% of all sales made at the SYI CPU and 33% of all post office box rental proceeds. As the contracting officer representative, Boyne (or one of his supervisors) conducts periodic on-site reviews of the SYI CPU to ensure that SYI is in compliance with the contract; Boyne's contact and oversight of the SYI CPU is, however, minimal. SYI runs the day-to-day operations of the SYI CPU, and SYI has the authority to hire and fire its CPU employees. SYI pays for its employees to receive training from the Postal Service with regard to running a CPU; this training includes learning about accounting procedures and equipment operation. SYI employees do not, however, wear Postal Service uniforms.

C. DISPLAYS IN THE SYI CPU

As stated above, the Church is a religious organization. . . . The SYI CPU contains both religious and non-religious displays. The exterior wall of the SYI CPU, which faces the street, has a label with the stylized eagle of the Postal Service indicating that the premises contains a Postal Service contract postal unit. The sign over the threshold to the building reads "Sincerely Yours." Another sign on the outside of the SYI CPU reads, in cursive type, "Sincerely Yours, Inc." and, in print type, "United States Contract Post Office."

The interior of the SYI CPU contains evangelical displays, including posters, advertisements, artwork, and photography, which change at various times during the year. Upon entering the SYI CPU, a postal counter, built by the Postal Service, sits immediately to the customer's right; behind the counter is a slat wall, also built by the Postal Service. In their submissions to the court, the parties describe the religious displays in the SYI CPU as follows:

(1) On the wall directly to the right of the postal counter and slat wall is a large religious display that informs customers about Jesus Christ and invites them to submit a request if they "need prayer in their lives." . . .

(2) Directly on the postal counter adjacent to this display sits a pile of "prayer cards" and a box into which postal service customers can put their prayer requests. . . .

(3) There is another display in the SYI CPU containing a framed advertisement for World–Wide Lighthouse Missions, the missionary organization incorporated by the Church to which the SYI CPU's profits are donated. This display, which sits directly opposite a shelving unit containing official USPS postal supplies and forms and above a table used by customers filling out USPS paperwork, offers biblical quotations and explains that the organization is "Endeavoring to Reach the World with the Love of Jesus Christ, one life at a time."

(4) Directly to the right of the World–Wide Lighthouse Missions display is yet another display that provides additional information about World–Wide Lighthouse Missions . . . . To the right of this display, immediately to the left of the Postal Service postal boxes, is a donation box, decorated with World–Wide Lighthouse Missions mission photographs.

(5) A "World–Wide Lighthouse Missions" coin donation jar, decorated with mission photographs, sits on the postal counter.

(6) To the left of the postal counter, a television monitor displays Church-related religious videos directly ahead, and in plain view, of customers waiting in line at the postal counter. . . .

(7) Above the official Postal Service rental post boxes and on the wall across from the transaction counter are various 8 ½″ x 14″ photographs of a number of the Church's events. Among these photographs is a picture of "Wally," a character who delivers Bibles, and conveys religious messages through puppets acting out skits, to children in the community. Wally is depicted standing beside George Washington and Abraham Lincoln.

(8) In addition to the above-listed displays, the SYI CPU features additional seasonal displays, including a large extended crèche, which is displayed in the SYI CPU's storefront window during the Christmas holiday season. In addition, there are, at various times, video presentations displayed on a television set inside the SYI CPU.

For its part, the Postal Service states that it does not encourage or induce SYI to display the religious materials in the SYI CPU. On the SYI CPU transaction counter, there is a sign, provided by the Postal Service, which reads: "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit." To the right of this disclaimer is another sign, which reads: "[The SYI] United States Contract Postal Unit is operated by the Full Gospel Interdenominational Church. Thank you for your patronage." The Intervenor Defendants maintain that SYI does not permit its employees to proselytize at the SYI CPU, and that, if a SYI CPU customer requests a prayer, SYI employees are instructed to refer such customers to the Church itself. . . .

Problem: City Involvement with a Neighborhood Association

The City of Shoreline maintains a "Community Promotion Program" (CPP), which seeks to assist neighborhood associations in Shoreline with organizing and operating. One of the ways the CPP does this is by providing funding for such associations. In order to receive CPP funding, a neighborhood association must have (1) an elected leadership board and (2) duly enacted bylaws that, among other things, delineate the geographical boundaries of the association and specify "a democratic process" for electing the board.

The CPP also features a grievance procedure by which residents could complain to the CPP that a city-funded association is failing to satisfy these criteria. If the administrator of the CPP concludes that an association's bylaws do not satisfy these criteria, she may recommend that the association revise its bylaws and practices. If she concludes that the association has continued to fail to satisfy these criteria, her only recourse is to withdraw CPP funding. The North Shoreline Neighborhood Association ("NSNA" or "Association") receives such funding, as well as funding from private sources.

Last year a group of residents of the North Shoreline neighborhood complained that their applications to run for leadership positions in the Association were unfairly denied and put up signs in the neighborhood explaining their position. The NSNA rejected the complaint and the residents appealed to the CPP using its grievance process. The CPP also rejected the complaint. However, it recommended that the Association revise its bylaws to be clearer about the NSNA's election process and residents' eligibility to run for leadership positions. The CPP tasked Tom Ramirez, a city-employed "neighborhood empowerment counselor" to work with the Association on the revision process. After consulting with Ramirez, the NSNA adopted revised bylaws. Those bylaws provided more clarity with regard to the election process, but they also provided that "a resident who has engaged in defamatory conduct against the Association or failed to engage constructively with the Association over the past year" would be barred from running for a board position.

The disgruntled residents sued the Association, claiming that the new bylaws punished them for their speech criticizing the Association, and thus violated their First Amendment rights. When their brief turned to the state action issue, it argued that "the city was responsible for the deprivation of their First Amendment rights because the city commanded and encouraged the Association by

exercising coercive power or overtly or covertly significantly encouraging" it to act unconstitutionally. In particular, the residents argued that the city encouraged the adoption of the new bylaws by both adopting a grievance procedure and requiring neighborhood organizations to have democratic processes and elections as "preconditions" for the receipt of public funds.

How likely is the court to find state action in this case? Why or why not? What facts would help you make that determination with more confidence? Why would those facts help you?