CONSTITUTIONAL LAW

CASES, APPROACHES, AND APPLICATION

SECOND EDITION

2023 ANNUAL SUPPLEMENT

William D. Araiza

Stanley A. August Professor of Law

Brooklyn Law School

Carolina Academic Press

Durham, North Carolina

Carolina Academic Press

700 Kent Street

Durham, North Carolina 27701

Telephone (919) 489-7486

Fax (919) 493-5668

E-mail: cap@cap-press.com

www.cap-press.com

TABLE OF CONTENTS

Part I: The Branches of the Federal Government

Chapter 1: The Judicial Power

B. Congressional Checks on the Judicial Power

1. Jurisdiction

Insert at page 37, before the Note:

Problem: Forging Immigration Documents

For many years it has been a federal crime, punishable by fines and/or imprisonment, to possess forged documents purporting to allow a non-citizen to work legally in the United States. In 2017, Congress, without repealing the criminal statute, enacts a new statute making such conduct a civil violation as well. The new law contemplates civil penalties of up to $2,000 for possession of each forged document. Adjudication of claims that a person has violated this new civil penalty provision are heard, in the first instance, by Administrative Law Judges (ALJs) housed in a court Congress sets up in the Department of Homeland Security (DHS). The law governing such adjudications provides as follows:

- ALJs shall decide all questions of law and fact relevant to the claim that the individual has violated the statute, and shall have the power to decide whether the individual has in fact committed that civil violation.
- Either the defendant or the government may appeal any fact-finding or legal conclusion to the Article III circuit court where venue is proper. The Article III court has the power to reverse any fact-finding that is "unsupported by substantial evidence" and the power to reject any legal conclusion "that the appellate court concludes is incorrect."
- If the ALJ orders the payment of a fine and the defendant refuses to pay, the government may apply to the Article III circuit court where venue is proper for an order enforcing the ALJ's judgment.

After a DHS investigation, Tyler Treadwell is charged by the agency with violating the statute. Rather than submit to the Article I adjudication process, Treadwell sues in federal court, arguing that the agency adjudication process violates Article III. In support, he offers, beyond the features of the adjudication scheme noted above, legislative history in the form of congresspersons' statements during debate on the bill, indicating an impatience with prosecutorial delays and difficulties in obtaining convictions under the pre-existing criminal statutory scheme.

Does Treadwell's argument prevail under *Schor*?

2. Other Means of Congressional Control Over the Courts

Insert at page 50, before the Note:

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:

> Section 1: 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.
>
> Section 2: Nothing in this section shall be construed—(a) 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 the proceedings referred to in Section 1; or (b) to apply to assets other than the assets described in Section 1.

When the district court attempts to seize the assets Section 1 describes, the Central Bank of Upper Riparia files a motion to quash the seizure, alleging that the statute violates the separation of powers by prescribing a rule of decision. What result? Does your answer change if, before Congress enacted this statute, the court in *Jackson* had decided that all of the assets identified in that case were in fact the sole property of the Government of Upper Riparia?

C. Self-Imposed Limits on the Judicial Power

2. The Case or Controversy Requirement

b. Standing

Insert at page 108, 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?

Insert at page 109, after Item 2 of the Note:

Note: Statutory Grants of Rights and "Injuries in Fact"

1. Cases such as *Havens* seemed to establish broad congressional authority to create statutory rights (for example, the right to truthful rental information in *Havens* itself), the deprivation of which creates Article III injury. Even *Lujan v. Defenders of Wildlife* acknowledged that authority, simply finding a problem with the generalized nature of the right Congress was said to have created by enacting the citizen-suit provision in the Endangered Species Act. However, in recent years the Court has cut back on Congress's latitude to influence standing analysis in this way.

2. In *Spokeo, LLC v. Robins*, 136 S.Ct. 1540 (2016), the Court considered an individual's lawsuit against a consumer reporting agency that, among other things, allegedly failed to follow statutorily-specified procedures relevant to collection and dissemination of consumer information. The plaintiff (Robins) had somehow found out that Spokeo had allegedly violated those procedures when providing information about Robins to a third party who had made an information request about Robins to Spokeo.

By a 6-2 vote (Justice Scalia having died before the case was decided), the Court held that the lower court had failed to adequately consider whether Robins' injury was sufficiently concrete to satisfy Article III. Writing for the majority, Justice Alito explained that a "concrete"

injury was not the same thing as a tangible injury, such as an injury to one's property or bodily integrity. Thus, some intangible injuries could be sufficiently concrete to satisfy Article III's requirements. Justice Alito wrote: "'Concrete' is not . . . necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free [religious] exercise)." According to the Court, therefore, injuries to persons' rights to free speech or the free exercise of religion, while seemingly intangible, are nevertheless sufficiently concrete to count for Article III purposes.

3. But how should courts decide whether an intangible injury is in fact sufficiently concrete? Justice Alito provided some guideposts:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." Similarly, Justice Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."

The Court also observed that a risk of concrete harm, and not just the actual existence of such harm, could suffice for Article III purposes.

4. Justice Thomas concurred. He argued for a distinction based on whether the plaintiff was seeking to vindicate a private right—that is, a right the plaintiff had against the defendant—as opposed to a public right—that is, a right the defendant owed to the public at large. (Note that this use of "private rights" and "public rights" is different from how those terms are used in the Article I courts context discussed earlier in this chapter. His dissenting opinion in the next case will make this clear.) Applying that distinction, he concluded that most of Robins' claims involved public rights. He wrote:

> The Fair Credit Reporting Act creates a series of regulatory duties. Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm. These consumer protection requirements include, for exam-

> ple, the requirement to "post a toll-free telephone number on [Spokeo's] website through which consumers can request free annual file disclosures."

He continued:

> But a remand is required because one claim in Robins' complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right. Section 1681e(b) [of the statute] requires Spokeo to "follow reasonable procedures to assure maximum possible accuracy of the information *concerning the individual about whom the report relates*." (emphasis added). If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury in fact.

Justice Thomas observed that, on remand, the lower court could consider whether that claim did in fact involve a private right.

5. Justice Ginsburg, joined by Justice Sotomayor, dissented. While she stated that she agreed "with much of the Court's opinion," she argued that Robins had shown concrete injury because Spokeo's dissemination of inaccurate information about him could have affected his job prospects.

6. *Spokeo* thus suggested that the mere fact that Congress had regulated an industry (here, the consumer information industry) for the benefit of individuals did not necessarily give one any particular individual the required concrete injury when the regulated party allegedly violated that regulation. Rather, something more—a concrete injury "in fact"—was required. What that "something more" entailed was further fleshed out in five years later.

TransUnion LLC v. Ramirez

141 S.Ct. 2190 (2021)

Justice KAVANAUGH delivered the opinion of the Court.

To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm.

In this case, a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act. The plaintiffs claimed that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, as maintained internally by TransUnion. For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were not provided to third-party businesses during the relevant time period. We conclude that those 6,332

class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim. . . .

I

In 1970, Congress passed and President Nixon signed the Fair Credit Reporting Act. The Act seeks to promote "fair and accurate credit reporting" and to protect consumer privacy. To achieve those goals, the Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers.

The Act "imposes a host of requirements concerning the creation and use of consumer reports." . . . First, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" in consumer reports. § 1681e(b). . . .

The Act creates a cause of action for consumers to sue and recover damages for certain violations. The Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages not less than $100 and not more than $1,000, as well as for punitive damages and attorney's fees.

TransUnion is one of the "Big Three" credit reporting agencies, along with Equifax and Experian. As a credit reporting agency, TransUnion compiles personal and financial information about individual consumers to create consumer reports. TransUnion then sells those consumer reports for use by entities such as banks, landlords, and car dealerships that request information about the creditworthiness of individual consumers.

Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. OFAC is the U. S. Treasury Department's Office of Foreign Assets Control. OFAC maintains a list of "specially designated nationals" who threaten America's national security. Individuals on the OFAC list are terrorists, drug traffickers, or other serious criminals. It is generally unlawful to transact business with any person on the list. TransUnion created the OFAC Name Screen Alert to help businesses avoid transacting with individuals on OFAC's list.

When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a "'terrorist list.'" Ramirez's wife had to purchase the car in her own name. . . .

In February 2012, Ramirez sued TransUnion and alleged three violations of the Fair Credit Reporting Act. . . . First, he alleged that TransUnion, by using the Name Screen product, failed to follow reasonable pro-

cedures to ensure the accuracy of information in his credit file.[*] . . . Ramirez requested statutory and punitive damages.

Ramirez also sought to certify a class . . . .Before trial, the parties stipulated that the class contained 8,185 members, including Ramirez. The parties also stipulated that only 1,853 members of the class (including Ramirez) had their credit reports disseminated by TransUnion to potential creditors during the period from January 1, 2011, to July 26, 2011. The District Court ruled that all 8,185 class members had Article III standing. . . . After six days of trial, the jury returned a verdict for the plaintiffs. The jury awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages for a total award of more than $60 million. . . . The U. S. Court of Appeals for the Ninth Circuit affirmed in relevant part. . . .

We granted certiorari.

II

The question in this case is whether the 8,185 class members have Article III standing as to their three claims. In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a "concrete harm." In Part III, we then apply the concrete-harm requirement to the plaintiffs' lawsuit against TransUnion.

A

The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." Separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."

Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of "Cases" and "Controversies." For there to be a case or controversy under Article III, the plaintiff must have a "'personal stake'" in the case—in other words, standing. To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: " What's it to you?'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *Lujan v. Defenders of Wildlife* (1992) [*Supra.* this Chapter]. If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve."

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "the rights of individuals," *Marbury v. Madison* (1803) [*Supra.* this Chapter], and that federal courts exercise "their proper function in a limited and separated government." Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia, federal courts instead decide only matters "of a Judiciary Nature." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 430 (M. Farrand ed. 1966).

---

[*] [Ed. Note: Ramirez's complaint also alleged other violations of the statute. This excerpt omits the Court's discussion of those other allegations.]

In sum, under Article III, a federal court may resolve only "a real controversy with real impact on real persons."

B

The question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be "concrete"—that is, "real, and not abstract." What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo v. Robins*, 136 S.Ct. 1540 (2016) [Note *supra.* this Chapter Supplement], indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.

As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. *Spokeo.* Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself. *See*, *e.g.*, *id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (abridgment of free speech), and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (infringement of free exercise)).

In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. In that way, Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *Id.*; *see Lujan*. But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."

Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*. As the Court emphasized in *Spokeo*, "Article III standing requires a concrete injury even in the context of a statutory violation."

Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment. As Judge Katsas has rightly stated, "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so." *Trichell v. Midland Credit Mgmt., Inc*, 964 F.3d 990 (CA11 2020); *see Marbury*; *see also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976) [Note *supra.* this Chapter]; *Muskrat v. United States* (1911) [*Supra.* this Chapter].

For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. . . .

To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). Those are not grounds for Article III standing.

1

The lead dissent notes that the terminology of injury in fact became prevalent only in the latter half of the 20th century. That is unsurprising because until the 20th century, Congress did not often afford federal "citizen suit"-style causes of action to private plaintiffs who did not suffer concrete harms. . . . All told, until the 20th century, this Court had little reason to emphasize the injury-in-fact requirement because, until the 20th century, there were relatively few instances where litigants without concrete injuries had a cause of action to sue in federal court. The situation has changed markedly, especially over the last 50 years or so. During that time, Congress has created many novel and expansive causes of action that in turn have required greater judicial focus on the requirements of Article III. *See*, *e.g.*, *Spokeo*; *Lujan*.

As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*.

A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law. *See Lujan*.

In sum, the concrete-harm requirement is essential to the Constitution's separation of powers. To be sure, the concrete-harm requirement can be difficult to apply in some cases. Some advocate that the concrete-harm requirement be ditched altogether, on the theory that it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing. But as the Court has often stated, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *United States v. Chadha*, 462 U.S. 919 (1983). So it is here.[3]

III

We now apply those fundamental standing principles to this lawsuit. [The Court found that only members of the class who had had incorrect information about them disseminated to third parties were injured by TransUnion's failure to comply with the statutorily-required procedures. As to those persons, the Court concluded that they had suffered a concrete harm with a "close relationship" to the harm associated with the tort of defamation. Persons whose information had been handled in violation of the statute, but who had not had their information disseminated to third parties, were held not to have suffered a concrete injury.]

* * *

It is so ordered.

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

TransUnion generated credit reports that erroneously flagged many law-abiding people as potential terrorists and drug traffickers. In doing so, TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures . . . . Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. The Constitution does no such thing. . . .

II

A

Article III vests "[t]he judicial Power of the United States" in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish." This power "shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

[3] The lead dissent would reject the core standing principle that a plaintiff must always have suffered a concrete harm, and would cast aside decades of precedent articulating that requirement, such as *Spokeo* . . . and *Lujan*. As we see it, the dissent's theory would largely outsource Article III to Congress. As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. But under the dissent's theory, so long as Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to individuals, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.

shall be made, under their Authority." (emphasis added). When a federal court has jurisdiction over a case or controversy, it has a "virtually unflagging obligation" to exercise it.

The mere filing of a complaint in federal court, however, does not a case (or controversy) make. Article III "does not extend the judicial power to every violation of the constitution" or federal law "which may possibly take place." Rather, the power extends only "to 'a case in law or equity,' in which a right, under such law, is asserted."

Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community. Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation. But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required "not only injuria [legal injury] but also damnum [damage]." This distinction mattered not only for traditional common-law rights, but also for newly created statutory ones. . . .

2

The "public rights" terminology has been used to refer to two different concepts. In one context, these rights are "taken from the public"—like the right to make, use, or sell an invention—and "bestowed ... upon the" individual, like a "decision to grant a public franchise." Disputes with the Government over these rights generally can be resolved "outside of an Article III court." Here, in contrast, the term "public rights" refers to duties owed collectively to the community. For example, Congress owes a duty to all Americans to legislate within its constitutional confines. But not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue.

The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases. See *Havens Realty Corp. v. Coleman* (1982) [*Supra.* this Chapter] ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"). And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. No one could seriously dispute, for example, that a violation of property rights is actionable, but as a general matter, "property rights are created by the State." In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery ..., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." T. Cooley, LAW OF TORTS. While the Court today discusses the supposed failure to show "injury in fact," courts for centuries held that injury in law to a private right was enough to create a case or controversy. . . .

B

Here, each class member established a violation of his or her private rights. The jury found that TransUnion violated three separate duties created by statute. All three of those duties are owed to individuals, not to the community writ large. Take § 1681e(b), which requires a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." This statute creates a duty: to use reasonable procedures to assure maximum possible accuracy. And that duty is particularized to an individual: the subject of the report. . . .

C

The Court chooses a different approach. Rejecting this history, the majority holds that the mere violation of a personal legal right is not—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.'" "No concrete harm, no standing."

That may be a pithy catchphrase, but it is worth pausing to ask why "concrete" injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing. And the concept then was not even about constitutional standing; it concerned a statutory cause of action under the Administrative Procedure Act.

The Court later took this statutory requirement and began to graft it onto its constitutional standing analysis. *See, e.g., Warth v. Seldin* (1975) [*Supra.* this Chapter]. But even then, injury in fact served as an additional way to get into federal court. Article III injury still could "exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Ibid.* So the introduction of an injury-in-fact requirement, in effect, "represented a substantial broadening of access to the federal courts." *Eastern Ky. Welfare Rights*. A plaintiff could now invoke a federal court's judicial power by establishing injury by virtue of a violated legal right or by alleging some other type of "personal interest." *Ibid.*

In the context of public rights, the Court continued to require more than just a legal violation. In *Lujan*, for example, the Court concluded that several environmental organizations lacked standing to challenge a regulation about interagency communications, even though the organizations invoked a citizen-suit provision allowing "any person [to] commence a civil suit ... to enjoin any person ... who is alleged to be in violation of " the law. Echoing the historical distinction between duties owed to individuals and those owed to the community, the Court explained that a plaintiff must do more than raise "a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." "'The province of the court,'" in contrast, "'is, solely, to decide on the rights of individuals.'" *Ibid.* (quoting *Marbury*). . . .

In *Spokeo*, the Court built on this approach. Based on a few sentences from *Lujan* . . . the Court concluded that a plaintiff does not automatically "satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." But the Court made clear that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo.*

Reconciling these statements has proved to be a challenge. But "the historical restrictions on standing" offer considerable guidance. A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. *See Lujan*. A statute that creates a private right and a cause of action, however, does gives plaintiffs an adequate interest in vindicating their private rights in federal court. See *Spokeo*.

The majority today, however, takes the road less traveled: "Under Article III, an injury in law is not an injury in fact." No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law. The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.

This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is inherently insufficient to support standing.[5] And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.

III

Even assuming that this Court should be in the business of second-guessing private rights, this is a rather odd case to say that Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress. . . .

I respectfully dissent.

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

The familiar story of Article III standing depicts the doctrine as an integral aspect of judicial restraint. The case-or-controversy requirement of Article III, the account runs, is "built on a single basic idea—the idea of separation of powers." Rigorous standing rules help safeguard that separation by keeping the courts away from issues "more appropriately addressed in the representative branches." In so doing, those rules prevent courts from overstepping their "proper—and properly limited—role" in "a democratic society." *Warth*.

After today's decision, that story needs a rewrite. The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. I join Justice THOMAS's dissent, which explains why the majority's decision is so mistaken. As he recounts, our Article III precedents teach that Congress has broad "power to create and define rights." . . . Under those precedents, this case should be easy. In the Fair Credit Reporting Act, Congress determined to protect consumers' reputations from inaccurate credit reporting. TransUnion willfully violated that statute's provisions by preparing credit files that falsely called the plaintiffs potential terrorists . . . . To say, as the majority does, that the resulting injuries did not "exist in the real world" is to inhabit a world I don't know. And to make that claim in the face of Congress's contrary judgment is to exceed the judiciary's "proper—and properly limited—role." *Warth*. . . .

I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any "violation of an individual right" created by Congress gives rise to Article III standing. But in *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS's approach in all but highly unusual cases. As *Spokeo* recognized, "Congress is well positioned to identify both tangible and intangible harms" meeting Article III standards. Article III requires for concreteness only a "real harm" (that is, a harm that "actually exists") or a "risk of real harm." And as today's decision definitively proves, Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments. Overriding an authorization to sue is appropriate when but only when Congress could not reason-

[5] See, e.g., *Lujan* ("Nothing in this contradicts the principle that the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" (internal quotation marks, brackets, and ellipsis omitted)); *Warth* ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute").

ably have thought that a suit will contribute to compensating or preventing the harm at issue. Subject to that qualification, I join Justice THOMAS's dissent in full.

Note: The "Injury in Fact" Requirement

1. The majority, seeking to delineate the proper role for Congress in identifying harms that constitute concrete Article III injury, writes that "even though Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." Does the Court offer any guidance for what impacts count as something more than "remotely harmful," and thus eligible for "elevation" to an Article III injury?

2. The quotation in the previous item appears to prohibit Congress from "simply enact[ing] an injury into existence." That statement implies that some injuries exist independently of congressional action. How would you identify such injuries? Do non-legislative sources of law (for example, the common law) help identify such injuries? If so, why should Congress be precluded from also having the power to "enact an injury into existence"?

3. In a footnote not reprinted in the excerpt, the Court said the following: "if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of unharmed plaintiffs to sue any defendants who violate any federal law. (Congress might, for example, provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law.)" Why is the deprivation of clean air necessarily not a particularized and concrete injury if Congress decides that persons should have a right to it? Is some other imperative motivating the Court to refuse to credit such harms as creating Article III injury?

4. Before *TransUnion*, one might have thought that the availability of statutory damages would suffice to provide a plaintiff a concrete stake in the outcome of the case, and thus standing. Consider the majority's comparison between the Maine and Hawaii property owner-plaintiffs in Part II-B. How does the Court's analysis of those two persons' standing to sue affect the role statutory damages plays in creating Article III standing?

5. Justice Thomas offers a very different approach to determining whether an injury is concrete. What role does his approach allot to Congress, and how is that role different than the one the majority gives it? Under the majority's approach, what is left of *Havens*' holding recognizing Congress's authority to enact "statutes creating legal rights, the invasion of which creates standing"? How would Justice Thomas's approach limit *Havens*?

c. Ripeness

***Insert at page 121, before Sub-part d*:**

Problem: We Didn't Start the Fire

In August, 2018, a fire destroyed 20,000 acres of forest belonging to the Yakima Tribe of Washington State, land that, under federal Native American law, is held in trust for the tribe by the U.S. Department of Interior ("Department"). Two months later, the Department sent a "Notice of Trespass" letter to Public Service Electric Company of Yakima County ("Utility"), a utility company located in the same general area as the tribe's forest. The Notice stated the Department's view that the Utility caused the fire through negligent maintenance of power lines that crossed the forest where the fire occurred. The letter reserved the right to assess treble damages for such conduct, with interest on such damages accruing daily, citing a federal statute that authorized the Department "to take such measures as are necessary to protect lands held in trust for native tribes." It also stated that "a preliminary assessment" indicated that the damage to the forest totaled approximately $20 million. The Notice also informed the Utility of an agency appeal process the Utility could invoke if it disagreed with any aspect of the Notice.

Rather than invoke that appeals process, the Utility sued in federal court. It denied that it was responsible for the fire, and it sought a declaratory judgment that federal law does not permit recovery of treble damages in such situations except in cases of "gross negligence."

The Department argues that the Utility's claim is not ripe. Is it correct?

d. Mootness

Insert at the bottom of page 127:

Problem: Prisoner Placement in Special Housing Units

Your client is Justin James, 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 they involves some degree of isolation.

James'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 James's situation from receiving monetary compensation for BoP violations of this type. Indeed, James tells you that all he wants is an injunction requiring BoP personnel to follow the law when they confine him to a SHU.

James 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 James's claims are moot? Based on James'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 156, 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 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."

---

[13] The Federalist, No. 69:

"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.

B. Competing Interests.

---

[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].

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 the unlike the President, the Vice President is amenable to such proceedings.]

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

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 180, before Section 2:

Problem: Delegated Authority to Limit Immigration

Article I grants Congress the power to "establish an [*sic*] uniform rule of Naturalization," a power that has generally been understood to encompass power over immigration. A federal immigration statute, 8 U.S.C. § 1182(f), contains the following congressional grant of power to the President:

> (f) Suspension of entry or imposition of restrictions by President
>
> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . .

In 2019, the President issued a proclamation finding that the entry into the nation of aliens who lack health insurance seeking to immigrate is "detrimental to the interests of the United States" because of the costs they impose on the American healthcare system. Relying on Section 1182(f), he orders a halt to such entries.

Relatives of uninsured aliens seeking to immigrate sue, alleging that Section 1182(f) constitutes an unconstitutional delegation of legislative authority to the President. How would Justice Kagan analyze that claim? What about Justice Gorsuch? What facts about, or characteristics of, immigration regulation generally or this proclamation in particular would be relevant to his analysis?

Reconsider this problem after you've read the materials on presidential authority in foreign affairs. Do those materials change your analysis?

3. Executive Control Over the Bureaucracy

Insert at page 230, at the end of the note that starts at page 228:

6. While much of the modern Court's jurisprudence regarding presidential control of high-ranking officials has focused on the President's removal authority, the Court has also focused on the appointment power. Appointment power issues largely, although not exclusively, turn on whether the official in question is a "principal" officer who, according to Article II's Appointments Clause, must be appointed by the President, or a mere "inferior" officer, whose appointment Congress may vest, as it wishes, in either the President, the "Courts of Law," or the "Heads of Departments." (Note that that Clause does not speak of "principal" officers, but rather refers to them simply as "Officers of the United States".)

Recall from *Morrison v. Olson* that the Court cited several criteria to decide that the Independent Counsel at issue in that case was an inferior officer. Nine years after *Morrison*, in *Edmond v. United States*, 520 U.S. 651 (1997), the Court, speaking through Justice Scalia, explained that "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior [other than the President]." Applying that criterion to the officials in question (the judges of the Coast Guard Court of Criminal Appeals, an Article I court), *Edmond* noted that those judges were supervised both by the Judge Advocate General of the Coast Guard, who exercised administrative control over them, and the Court of Appeals for the Armed Forces, an Article I court that had the power to reverse those officials' rulings. Evaluating that control, *Edmond* concluded: "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." For that reason, the Court held that those judges were inferior officers.

In later Appointments Clause cases, the Court has applied the *Edmond* "does the official in question have a superior?" test. For example, in *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (2021), the Court applied *Edmond* to Article I judges who heard claims about the validity of patents. It concluded that those patent judges, unlike the Coast Guard judges in *Edmond*, were

principal officers who thus could be appointed only by the President. The Court, speaking through Chief Justice Roberts, acknowledged that the patent judges, just like the Coast Guard judges in *Edmond*, were subject to administrative supervision by a higher ranking official (the Director of the Patent and Trademark Office). However, unlike the Coast Guard judges in *Edmond*, the patent judges in *Arthrex* were not subject to the supervision of other executive branch officers when they decided patent claims. The Chief Justice concluded: "Given the insulation of [the patent judges'] decisions from any executive review, the President can neither oversee [those judges] himself nor attribute [their] failings to those whom he can oversee. [Those judges] accordingly exercise power that conflicts with the design of the Appointments Clause to preserve political accountability."

Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, dissented. He insisted that "The Court has been careful not to create a rigid test to divide principal officers … from inferior ones." Applying *Edmond*, he argued that the Director of the Patent and Trademark Office exerted both administrative control over patent judges and also control over the procedures by which those judges decided patent claims, with the result that those judges were subject to the same types of control by other executive branch officials as the Coast Guard judges in *Edmond*. Thus, he concluded, the patent judges, like those Coast Guard judges, should have been understood as inferior officers. Justice Breyer, joined by Justices Sotomayor and Kagan, wrote a separate dissent to argue for what he called a "functional," as opposed to a "formalistic" understanding of the principal/inferior officer distinction.

D. Foreign Affairs and the War Power

2. The War Power

c. The War Power in a World of Small Wars

Insert at page 257, before the Note:

Problem: Capturing a Renegade

In early 2022, U.S. intelligence agencies begin picking up signals that a military commander in the Central Asian nation of Balistan has become a renegade. He refuses orders from his nation's military establishment, proclaims himself the "Protector" of the province in which he is located, and offers safe haven to terrorists who have sought to destabilize neighboring nations. Officials worry that Balistan lacks the power to capture the Protector and his force of several hundred well-armed soldiers, who he can continue to pay due to the province's lucrative traffic in rare minerals. Even more worryingly, the Protector threatens to block the flow of electricity from a large hydroelectric plan in the province that supplies a substantial amount of the power needs of several neighboring nations, and to continue doing so until the world community recognizes his sovereignty over the province.

After the Protector cuts off the electricity from the plant for several days, "as a warning," and after a failed attempt by the Balistan Army to dislodge him, the President decides to act. His military advisors prepare a plan that would entail a cruise missile attack on the Protector's base, followed by an airborne assault. The assault would entail several thousand U.S. paratroopers, backed up by air support. His advisors predict that U.S. forces can establish control of the base within two days, at a cost of 25-50 American combat deaths. However, they explain to the President that there is a 10% chance that the Protector will be able to disperse his forces after the cruise missile attack and before the airborne assault. If that happens, they warn, U.S. forces could be forced essentially to chase down the hostile forces, a process that could take up to three weeks. That eventuality could raise casualties substantially, especially if local leaders remain loyal to the Protector and require American forces to guard against attacks by the local population. In the worst-case scenario, capturing the Protector and neutralizing his forces might require a deployment, not just of combat troops but of supply and rear echelon support forces which themselves would have to be protected, thus increasing the ground troop footprint and raising the attendant risks of casualties.

As a lawyer in the Office of Legal Counsel, you're tasked with writing a memo explaining whether the President has the authority to go forward with this mission without getting congressional approval. Military leaders warn that any public debate of this option would significantly raise the cost and risk, as it will give the Protector time to disperse his forces and potentially cause havoc in the region by cutting off the electricity supply and unleashing his terrorist allies on neighboring nations.

What would your analysis look like?

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 328, 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 329-345) and the note about *United States v. Morrison* (pages 345-346).

Return to this question again after you read *Gonzalez v. Raich* (pages 346-360).

How does your analysis change after each successive case?

4. A More Limited Commerce Power

Insert at page 362, before the Note:

Note: Enumerated Powers—and Implied Ones, Too?

1. In *McCulloch v. Maryland* (1819) (*Supra.* Chapters 3 & 4), Chief Justice Marshall went out of his way to "acknowledge" that the federal government is "one of enumerated powers." But he also noted that "[t]o [the Constitution's] enumeration of powers is added" what we know as the Necessary and Proper Clause. In *National Federation*, Chief Justice Roberts, writing for himself, rejected the argument that the ACA's individual mandate was constitutional under that clause, since it was not an "exercise[] of authority derivative of, and in service to, a granted power," or an exercise of "an authority that is narrow in scope or incidental to the exercise of the

commerce power." Writing for four justices, Justice Scalia also rejected the Necessary and Proper Clause argument, in part because the individual mandate "violate[d] the background principle of enumerated (and hence limited) power."

But what if Congress had implied regulatory powers, beyond those enumerated in Article I? That question implicitly arose in a 2021 case about eminent domain.

2. "Eminent domain" is the power government has to "take" a property owned by someone else. For example, if a government wishes to build a highway, and owners of property along the proposed route choose not to sell their land voluntarily, the government can bring a lawsuit to "condemn" the property and "take" it, as long as it pays the owner "just compensation."

In 2018, a federal agency, acting pursuant to a federal statute, authorized a pipeline company, PennEast, to commence eminent domain actions against owners of property along the route of a pipeline the agency had approved. One of those owners was the State of New Jersey. As you'll see in Chapter 6, an eminent domain action against an unconsenting state would normally be barred by the doctrine of state sovereign immunity, as reflected in the Eleventh Amendment. And indeed, New Jersey refused to consent to PennEast's lawsuit, asserting its Eleventh Amendment immunity. In so doing, the state relied heavily on the fact that in 1996, the Court had held that Congress could not use its Commerce Clause authority to abrogate (or wipe away) that immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (*Infra.* Chapter 6). It was precisely under that authority that Congress had enacted the pipeline statute.

3. Despite the seeming straightforwardness of the state's sovereign immunity argument, the Court rejected it. *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021). A note in Chapter 6 sets forth the details of the Court's sovereign immunity analysis. For now, the important point about the five-justice majority opinion was that it concluded that, in ratifying the Constitution, the states had implicitly waived their sovereign immunity to federal eminent domain lawsuits even when brought, not by the federal government itself, but by authorized private parties. The Court stated its conclusion early in its opinion: "Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."

But where is "the eminent domain power"? It is not enumerated in the Constitution. (The Fifth Amendment requires government to pay "just compensation" if it takes property, but it does not explicitly authorize eminent domain actions, and the Court did not rely on it.) If *Seminole Tribe* prohibits Congress from using its Commerce Clause authority to abrogate states' sovereign immunity, then the pipeline statute's authorization of PennEast's eminent domain suit against New Jersey had to be found somewhere else. In her dissent, Justice Barrett argued that that statute was based on the Commerce Clause, as "augmented" by the Necessary and Proper Clause. Thus, she argued, the case was governed by *Seminole Tribe*. (She did not even discuss

the possibility that somehow the Necessary and Proper Clause authorized lawsuits against states that the Commerce Clause itself did not. What problems would such a conclusion raise?)

4. Chief Justice Roberts, writing for the majority, never explicitly located "the eminent domain power" in any particular constitutional provision. Instead, he quoted Nineteenth Century caselaw as follows:

> As we explained in *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641 (1890), "[i]f it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it."

Does this mean that the federal government has inherent powers that transcend those granted by the Necessary and Proper Clause? Consider the language the Chief Justice quoted from *Cherokee Nation*, referring to the federal government having powers "in order that it may fully carry out the objects and purposes of the Constitution." Doesn't that sound just like the Necessary and Proper Clause? But to the majority, it seems as though this inherent power was more powerful than that contained in the Necessary and Proper Clause, since that power included the power to overcome a state's Eleventh Amendment sovereign immunity—something the Necessary and Proper Clause presumably lacks.

5. Does the majority opinion in *PennEast* suggest that, in fact, the federal government is not merely a government of enumerated powers, but also has implied powers? *Compare United States v. Lopez* (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"). Recall also the language from *McCulloch* and *National Federation*, quoted in Item 1, above, all to the same effect. Is *PennEast* consistent with this basic understanding of federal power?

Chapter 5: Residual State Powers—and Their Limits

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

3. Modern Applications

***Insert at page 402, before part 4*:**

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

Insert at page 407, after item 2 of the note that begins at page 403:

3. In 2023, the Court gave a fractured answer in a dormant Commerce Clause case, and in the process either rejected or called into question aspects of dormant Commerce Clause doctrine. In *National Pork Producers Council v. Ross*, 143 S.Ct. 1142 (2023), pork growers challenged a California law requiring humane living conditions for pigs, wherever raised, that were intended to be sold for human consumption in California. The plaintiffs conceded that the law regulated

California and out-of-state pork producers evenhandedly. Nevertheless, they argued that the law violated the dormant Commerce Clause, either because it had the effect of regulating commerce beyond California's borders or because it failed the benefit-burden balancing the Court uses to evaluate evenhanded laws.

The Court first considered whether the California law, by imposing humane living conditions requirements for any pigs raised for food sale in California, violated the dormant Commerce Clause by imposing burdens on pig-raising beyond California's borders. The Court, speaking through Justice Gorsuch, rejected what it described as the plaintiffs' argument (which cited cases including *Baldwin v. GAF Seelig* (1935) (*supra* this Chapter)) that any such law was subject to "an almost *per se*" rule prohibiting laws with such extraterritorial effects. He wrote: "A close look at those cases … reveals nothing like the rule petitioners posit. Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests."

The Court then turned to the plaintiffs' argument that the California law failed the benefit-burden balancing announced in *Pike v. Bruce Church*, 397 U.S. 137 (1970) and applicable to state laws that regulate in-state and interstate commerce evenhandedly. The Court rejected that argument, with a plurality concluding the plaintiffs had not shown that the California law imposed a substantial burden on interstate commerce. Relying heavily on *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978) (Note *supra* this Chapter), that plurality concluded that the California law simply had the effect of shifting the state's supply of pork from producers (both local and out-of-state) who were unwilling to comply with its provisions to those (again, both local and out-of-state) who were willing to do so.

Importantly, in rejecting the plaintiffs' *Pike*-based argument, a Court majority observed that the plaintiffs "overstated the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence. … [I]f some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." Nevertheless, the Court conceded that some of its cases did involve the Court using *Pike* to strike down laws that were clearly non-discriminatory. However, now speaking only for a plurality, Justice Gorsuch rejected application of *Pike* "to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than [judges'] assessment of the relevant law's 'costs' and 'benefits.'" The plurality found that task to exceed judges' competence and authority, and thus suggested that at least a class of situations involving non-discriminatory laws should apparently be immune from any dormant Commerce Clause review.

A variety of partial concurrences agreed with different components of this analysis. However, a majority of the justices remained willing to subject any state law to *Pike* balancing, at least if the law imposed substantial burdens on interstate commerce. Nevertheless, *National Pork*

revealed that more and more justices have become willing to cut back on the scope of dormant Commerce Clause scrutiny of non-discriminatory statutes.

4. Consider the various critiques of benefit-burden balancing you've encountered in this note. To what extent do you agree with them? Are there benefits to dormant Commerce Clause scrutiny of even non-discriminatory laws? More broadly, consider Justice Thomas's critique of the entire dormant Commerce Clause idea, reflected in item 2 of this note, in the casebook. Even if you are sympathetic to Justice Gorsuch's skepticism of judicial review of "duly enacted state laws regulating the in-state sale of ordinary consumer goods … based on nothing more than [judges'] assessment of the relevant law's 'costs' and 'benefits,'" do you think Justice Thomas's broader critique goes too far? Why or why not?

Chapter 6: Federal Regulation of the States

A. The Prohibition on "Commandeering"

***Insert at page 461, before Part C*:**

Problem: Applying Commandeering and Preemption Doctrine

Consider the following two fact patterns. Do they both violate the anti-commandeering principle, or do they both reflect constitutionally-valid federal preemption of state law? Or are different results appropriate for the two cases? Why? The note after this problem explains the Court's reasoning in the case on which the second of these fact patterns is based. Make sure to think about that fact pattern before continuing on to that note.

Fact Pattern One: Cellular Boosters

Extend-Net is a company that builds and installs small booster stations that extend the reach of a signal sent by a cellular tower. It installs these stations on public rights-of-way, such as utility poles, in localities where cellular coverage is poor and a full-scale tower impracticable.

In 2013, Extend-Net gets approval from the New York State Department of Utilities to install several booster stations on utility poles owned by the state in the town of Hampden, New York, at the request of Extend-Net's customer, Ameri-Call, a large cellular network whose coverage in Hampden is poor. It installs the stations. Five years later, Extend-Net requests approval from the State to modify those stations, to allow them to boost the signal not just of Amer-Call's network, but also that of Value-Call, another large cellular network. The State rejects the application, concluding that Extend-Net has failed to show, as state law requires, that Value-Call's network needs boosting within the town.

Extend-Net sues, claiming that the State's denial violates a federal telecommunications statute which reads as follows: "A State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base or booster station that does not substantially change the physical dimensions of such tower or base or booster station." The parties agree that the rejected modifications of the existing booster stations "do[] not substantially change the physical dimension" of the booster stations. Nevertheless, the State argues that the federal law unconstitutionally commandeers the actions of the state government. Extend-Net counters that the federal law simply preempts state law.

Which side is correct?

Fact Pattern Two: Native American Child Welfare

Congress has broad power under the Indian Commerce Clause to regulate the affairs of Native American tribes and their members. In the Indian Child Welfare Act of 1978 (ICWA), Congress declared that it was the policy of the United States "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."

Among other provisions, the ICWA provides that parents of Native American children are given the right to intervene in child custody proceedings. This right applies both to proceedings that seek an involuntary termination of parental rights (from the Native American parent's perspective) or a voluntary termination, as for example, when a Native American parent chooses to give a child up for adoption. The law also provides for a preference for placement of such children in the homes of Native American families and requires adoption agencies to respect, "if at all possible," the placement wishes of the tribe to which the child belongs. It also requires that any party seeking to place a native child in foster care or terminate a native parent's parental rights demonstrate that efforts have been made to provide remedial services to prevent breaking up the native family, and that those efforts have failed.

Thus, state family law courts (when they otherwise have jurisdiction over the Native American child) must provide these procedural and substantive rights in their adoption proceedings, and adoption agencies seeking to place Native American children in adoptive homes must provide the intervention right and respect, "if at all possible," the tribe's wishes for the child's placement.

A collection of states, joined by non-Native families who each wish to adopt a particular Native American child, sued, alleging that these provisions of the ICWA violated the anti-commandeering principle by regulating how state entities proceed when placing children through the state adoption system. The defendants counter that the ICWA simply pre-empts inconsistent state family law statutes as applied to Native American children.

What facts would you need to know before deciding which side is right?

Note: *Haaland v. Brackeen*

The second of the fact patterns in the previous problem, dealing with a federal statute regulating the placement of Indian children with non-Indian parents, is based on a case the Court decided in 2023, *Haaland v. Brackeen*, 143 S.Ct. 1609 (2023). In *Brackeen*, the Court rejected the plaintiffs' anti-commandeering challenges to the law (the Indian Child Welfare Act, or ICWA). (The plaintiffs also made non-delegation and equal protection arguments, which the Court refused to decide based on its conclusion that no plaintiff had standing to raise them.)

The Court's anti-commandeering analysis rested heavily on its conclusion that most of the burdens the ICWA imposed applied to both states and to private parties—for example, in both states' and private parties' capacities as plaintiffs in proceedings to terminate the parental rights of Indian parents. In reaching that conclusion, the Court cited, as an example of such a generally-applicable statute, the one upheld in *Reno v. Condon*, 528 U.S. 141 (2000) (Note *supra* this Chapter), where the Court rejected an anti-commandeering challenge on this same ground. Writing for the Court in *Brackeen*, Justice Barrett, citing *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) (Note *supra* this Chapter), wrote that "Legislation that applies evenhandedly to state and private actors does not typically implicate the Tenth Amendment." Justice Barrett conceded that the statute directed state courts to apply the federal statute's child-placement preferences in relevant cases. However, she observed that Congress may direct state courts to either entertain a federal cause of action or, as in this case, to apply federal law rules to state law causes of action (such as those dealing with parental rights). Finally, she concluded that nothing in the Tenth Amendment prohibited Congress from imposing record-keeping and record-transmittal requirements on state courts.

Justices Thomas and Alito dissented, arguing that Congress lacked any Article I authority to enact the statute.

C. Constitutional Limits on Judicial Remedies Against States

1. The *Young* Doctrine

***Insert at page 480, 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 re-

ceived 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*."

2. State "Waiver" of Sovereign Immunity

Insert at page 496, before the Note:

Note: Eminent Domain Suits, State Sovereign Immunity, and "the Plan of the Convention"

1. The federal government, like states, has the power of "eminent domain"—that is, the power to take property from private landowners as long as it pays what the Fifth Amendment calls "just compensation." For example, if the government wants to build a highway, it can insist that the highway run through someone's property by "condemning" the property, which then triggers the just compensation requirement. Usually, such condemnations occur not by the government simply walking onto someone's land and literally "taking" it, but by the government bringing a condemnation suit in the appropriate court, where the landowner could dispute the legality of the condemnation (for example, by arguing that the taking was not for a public purpose, as the Constitution requires) or (more commonly) where it could dispute the amount of compensation the government is offering to pay.

In 2021, the Court considered whether Congress could delegate to a private party the power to use eminent domain to condemn state-owned property. Federal law authorizes persons constructing federally-approved pipelines to bring eminent domain suits to obtain the necessary property, just like the federal government itself could do if it wished to take a piece of property. A Delaware-based pipeline company, PennEast, brought a suit in federal court in New Jersey, seeking to condemn land New Jersey owned that the company wanted to use for a pipeline that the relevant federal regulatory agency had approved. New Jersey argued that the Eleventh Amendment barred the company's eminent domain lawsuit, noting that the federal pipeline statute was enacted pursuant to the Interstate Commerce Clause and thus arguing that *Seminole Tribe* precluded Congress from using the commerce power to authorize private-party eminent domain lawsuits against unconsenting states.

2. In *PennEast Pipeline v. New Jersey*, 141 S.Ct. 2244 (2021), a five-justice majority rejected New Jersey's sovereign immunity argument and allowed the eminent domain lawsuit to proceed in federal court. Speaking for the Court, Chief Justice Roberts acknowledged that *Seminole Tribe* precluded Congress from using the commerce power to make unconsenting states li-

able for lawsuits. But he argued that in "the plan of the [constitutional] convention," states had surrendered any sovereign immunity to federal eminent domain actions, including those brought by private parties acting under federal authority. He concluded: "PennEast's condemnation action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented under the plan of the Convention."

Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, dissented. She disagreed with the majority's suggestion that the eminent domain power is a distinct power, over which states surrendered their immunity in the plan of the convention. Instead, she argued that "a taking is a garden variety exercise of an enumerated power like the Commerce Clause." According to Justice Barrett, because PennEast's eminent domain suit was authorized by the Natural Gas Act (NGA), and because Congress enacted the NGA based on its Commerce Clause authority, the case presented a straightforward application of *Seminole Tribe*. She also argued that Congress could ensure construction of federally-approved pipelines simply by requiring that the federal government itself bring eminent domain suits against states, since the Eleventh Amendment has been held not to prohibit the federal government from suing states. Justice Gorsuch, joined by Justice Thomas, joined Justice Barrett's dissent but also wrote a short separate dissent.

3. The justices' debate in *PennEast* about state sovereign immunity raises important questions about federal power more generally. The NGA was undoubtedly enacted pursuant to Congress's power to regulate interstate commerce. Why, then, as Justice Barrett argued, didn't the case present a simple application of *Seminole Tribe*'s rejection of a congressional power to abrogate state sovereignty when legislating pursuant to that power? In addressing that question, Chief Justice Roberts wrote:

> [C]ongressional abrogation is not the only means of subjecting States to suit. As noted above, States can also be sued if they have consented to suit in the plan of the Convention. And where the States "agreed in the plan of the Convention not to assert any sovereign immunity defense," "no congressional abrogation [is] needed." . . . [T]he States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees. The plan of the Convention reflects the "fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U. S. 706 (1999) [Note *supra.* this Chapter]. And we have said regarding the exercise of federal eminent domain within the States that one 'postulate of the Constitution [is] that the government of the United States is invested with full and complete power to execute and carry out its purposes.'

Where is "the federal eminent domain power" located? The majority opinion implies that it is an inherent government power. (Indeed, Chief Justice Roberts briefly traced the history of that power back to biblical times.) But recall that cases such as *United States v. Lopez* (1995) (*Supra.* Chapter 4) insist that the Constitution created a government of enumerated powers. Justice Bar-

rett disagreed with the majority's implication of an inherent federal eminent domain power, arguing that "the Constitution enumerates no stand-alone 'eminent domain power.'" (She argued that the Takings Clause merely requires compensation when the federal government takes property, presumably acting pursuant to some enumerated power.)

How the Court approaches this question of implied federal power is important in itself, as suggested by the note on this case that appears in Chapter 4. But it is also important for the Court's state sovereign immunity jurisprudence. The extent to which the Court finds such implied federal powers that involve the states' surrender of their sovereign immunity "in the plan of the convention" will say much about how much room Congress actually has to limit state sovereign immunity despite *Seminole Tribe*'s seemingly near-absolute rule against Article I-grounded abrogations of that immunity.

D. The Taxing and Spending Power as an Alternative to Regulation

1.5. State Immunity from Federal Taxation

Insert at page 504, before Section 2:

Note: Intergovernmental Tax Immunities

1. Recall from Chapter 3 that in *McCulloch v. Maryland* (1819), the Supreme Court prohibited states from imposing direct taxes on federal instrumentalities, such as the Bank of the United States. This note considers the question of a reciprocal immunity—that is, an immunity state instrumentalities might enjoy from federal taxation. While it focuses on state immunity from federal taxation, it also explains the evolution of the federal government's immunity from state taxation in order to highlight the similarities and differences between the two immunities.

2. In *Collector v. Day*, 78 U.S. 113 (1870), the Court held that the federal government could not tax the salary of state court judge. Writing for the Court, Justice Fuller relied on states' reserved powers, in particular, their power to establish governing institutions (such as state courts) that were sovereign within the realm allowed by the Constitution. Essentially, then, just as state taxation of the Bank of the United States in *McCulloch* would impair the federal government's power to act pursuant to its constitutional powers, so too the Court reasoned that federal taxation of state court judges' salaries would impair states' power to act pursuant to their own constitutional powers.

Justice Bradley dissented. He echoed Marshall's point in *McCulloch* that state taxation of federal instrumentalities would allow states to tax persons who were not its constituents and not represented in its political process, a problem that did not arise when the federal government taxed state entities or employees.

3. *Day*'s reciprocal tax immunity began to deteriorate in the early Twentieth Century. For example, in 1905, the Court upheld a federal tax on a license to sell liquor as an agent of the state. *South Carolina v. United States*, 199 U.S. 437 (1905). The Court suggested that the business nature of the taxed activity opened it up to federal taxation, despite the activity being carried out by an agent of the state. Later, and in some tension with the trend against a reciprocal approach to tax immunities, in two cases from the late 1930s the Court overruled *Day*'s precise holding when it allowed the federal government to tax state employees and states to tax federal employees. *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (allowing the federal government to tax state employees); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (allowing states to tax federal employees).

Despite that continued hint of a reciprocity approach, starting in the 1940s the Court's tax immunity jurisprudence began to diverge depending on the entity that was doing the taxing and the one that was being taxed. With regard to state taxation of the federal government, the Court began to develop a test that inquired into "the legal incidence of the tax." *State of Alabama v. King & Boozer*, 314 U.S. 1 (1941). Under that test, the Court inquired into the identity of the entity that was being forced to pay the tax, to ensure that the state was not directly taxing the federal government itself. For example, in *King & Boozer*, a business bought lumber in order to build a military camp for the federal government and was assessed a state sales tax. The Supreme Court held that the tax was valid because it fell upon the contractor, not the federal government, even though the construction contract obliged the federal government to pay for all taxes incurred in the project.

Even though the "legal incidence" test had the effect of opening up some federal activity to state taxation, the converse test, relating to federal taxation of states, allow more inter-governmental taxation. In *New York v. United States*, the Court allowed any non-discriminatory taxation of state income, including income earned by the state itself, except for income that was "uniquely capable of being earned by a state." 326 U.S. 572 (1946).

4. In 1988, the Court summarized the state of inter-governmental tax immunity as follows:

> [U]nder current intergovernmental tax immunity doctrine, the States can never tax the United States directly, but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. . . . The rule with respect to state tax immunity is essentially the same, except that at least some nondiscriminatory federal taxes can be collected directly from the States, even though a parallel state tax could not be collected directly from the Federal Government.

South Carolina v. Baker, 485 U.S. 505 (1988). For an example of the non-discrimination requirement in action, see *Davis v. Michigan Dept of Treasury*, 489 U.S. 803 (1989) (striking down a Michigan law that exempted from state income tax state government retirement income while still taxing federal government retirement income).

5. The asymmetry of these immunities reflects the different foundations for each one. As Marshall explained in *McCulloch*, federal immunity from state taxation rests on both the Supremacy Clause and the theory that a state should not have the power to levy taxes that would fall on persons who lack access to that state's political process. By contrast, state immunity from federal taxation rests on Tenth Amendment-based conceptions of residual state sovereignty, and thus on the Court's estimations of what is necessary for states to exercise that sovereignty. As Chief Justice Stone said in *New York*:

> By its terms the Constitution has placed only one limitation upon [the federal taxing] power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax "on Articles exported from any State." Barring only exports, the power of Congress to tax reaches every subject. But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government.

2. The Spending Power as a Means of Influencing State Government Conduct

***Insert at the end of page 510*:**

Problem: Using Pandemic Recovery Funds

The COVID-19 pandemic wreaked havoc on the budgets of many state governments, as tax revenues plummeted and social service and first responder and healthcare costs soared. In 2021, Congress enacted a massive spending program that offered money to states to assist them with their expenditures.

The American Renewal Act (ARA) provides the following conditions on state use of the money the statute allocates to that particular state. Under the ARA, states must use their money:

> (A) to respond to the public health emergency with respect to COVID-19 or its negative economic impacts . . .
>
> (B) to compensate workers performing essential work during the COVID-19 public health emergency . . .

> (C) for the provision of government services to the extent of the reduction in revenue of such State . . . relative to revenues collected in the most recent full fiscal year of the State ... prior to the pandemic ... or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

The State must use the funds by December 31, 2024. Id. The law also imposes one more term. In a section labeled "Further Restriction On Use Of Funds," the ARA provides that:

"(A) IN GENERAL.—A State or territory shall not use the funds provided under this section ... to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

North Carolina is set to receive $5.5 billion in funds under the law, an amount equal to 7.4% of the state's total spending last year. It wants to sue the federal government, alleging that the law violates Congress's powers to attach conditions to spending grants to states. What arguments could it make? How successful do you think they would be?

Problem: Medicaid Conditions—Again

In addition to the Medicaid expansion that was the subject of the Spending Clause analysis in *National Federation*, the 2010 Affordable Care Act (ACA) also made other changes to Medicaid. Recall that Medicaid is a joint federal-state program that is largely funded by the federal government but administered by individual states, each of which sets its own eligibility rules, subject to federal restrictions. Medicaid has been in existence since 1965; since then, all states have participated in the program. Beyond the eligibility expansion condition that was struck down in *National Federation*, another Medicaid change the ACA made in 2010 was to require that any state accepting federal Medicaid funds "not discriminate based on the basis of sex in its administration of [its Medicaid] program." Under the law, any state that violates this condition forfeits all of its Medicaid funding.

Nebraska, like all states, participates in the Medicaid program. But it has a policy that it will not provide Medicaid coverage for gender-affirming surgery (also sometimes called gender transition procedures)—that is, surgery that conforms persons' sex organs to their self-identified gender. Nebraska sues the federal government, claiming that the condition violates the limits on the Spending Clause established by *South Dakota v. Dole*.

What would you like to know before determining whether Nebraska's claim is likely to succeed?

Part III: Substantive Rights Under the Due Process Clause

Chapter 9: The Right to an Abortion

C. The *Casey* Resolution (?)

***Delete Part C and insert at the top of page 585*:**

C. From *Casey* to *Dobbs*

1. As noted at the end of the previous sub-section, in 1992 many observers thought that a Court majority had been assembled to overrule *Roe*. However, in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed what a three-justice plurality called *Roe*'s "essential holding." That plurality, speaking through a joint of opinion written by Justices O'-Connor, Kennedy, and Souter, declined to state explicitly that it agreed with *Roe*'s analysis. However, it concluded that *stare decisis* considerations justified reaffirming that "essential holding," regardless of "any reservations any of us may have in reaffirming" that holding.

The joint opinion began its *stare decisis* analysis by examining the standard factors courts use when deciding whether to overrule a precedent: the opinion's workability, the reliance interests it had generated, and whether subsequent legal or factual developments had undermined the opinion's foundations. After concluding that those factors did not favor overruling, the joint opinion then considered the significance of what it called "the sustained and widespread debate *Roe* ha[d] provoked," and whether that debate justified overruling nonetheless.

The joint opinion concluded that it did not. It compared the intense and publicly-debated calls to overrule *Roe* with analogous calls to overrule the *Lochner* line of economic due process cases (discussed in Chapter 7) and *Plessy v. Ferguson*'s (1896) acceptance of racial segregation via the "separate but equal" formula. (*Plessy* and it eventual overruling are discussed in Chapter 13). However, the joint opinion concluded that the calls to overrule *Roe* were different. It described the eventual demise of economic due process as a function of the obvious failure of *laissez-faire* economics during the Great Depression. Similarly, it concluded, that by the time of *Brown v. Board of Education* (1954) (*infra.* Chapter 13), it was clear that racial segregation in public facilities necessarily stigmatized the targets of such segregation as inferior. The joint opinion concluded that *Roe*, unlike *Lochner* and *Plessy*, could not be understood as having become seen as fundamentally based on incorrect facts.

The opinion continued on. It concluded that, given its analysis up to that point, overruling *Roe* would represent a simple capitulation to public opinion rather than a recognition of any flaws in *Roe* that justified rejecting it on its own terms. It insisted that such a capitulation would destroy the public's faith in the Court as a non-political institution. The opinion explained:

> The Court's power lies … in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine

> what the Nation's law means and to declare what it demands. … The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. … Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

2. For these reasons, the joint opinion concluded that *stare decisis* required the reaffirmation of what it called *Roe*'s "essential holding": that a woman has the ultimate right to decide whether to have an abortion prior to fetal viability. However, it critiqued *Roe*'s trimester framework, concluding that it did not adequately account for the state's interest in protecting fetal life from the onset of the pregnancy. The result was that the Court recognized that that state interest in regulating abortion began with the onset of pregnancy.

Balancing that state interest (and its interest in women's health) with *Roe*'s "essential holding" led the joint opinion to announce an "undue burden" test. Under that test, a state could, from the outset of pregnancy, take steps to promote childbirth, encourage pregnant women not to have an abortion, and ensure the safety of women seeking abortions. However, prior to fetal viability, such attempts could not impose an "undue burden" on the woman's right to choose to have an abortion. The joint opinion provided the following guidance on the "undue burden" standard:

> (a) To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of *Roe*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
>
> d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Applying these principles, the three justices authoring the joint opinion voted to strike down the challenged law mandating spousal notification of a women's intention to have an abortion, but to uphold the state's parental consent requirement and its requirement that women seeking abortions wait 24 hours after the abortion provider gave the woman government specified information about the fetus and the availability of government assistance for new mothers. These votes all prevailed, as explained in the next item.

3. Justices Blackmun (*Roe*'s author) and Stevens would have reaffirmed *Roe* in its entirety, and struck down all the state's restrictions. Thus, along with the joint opinion's three votes, they created a five-justice majority for striking down the spousal notification requirement. Chief Justice Rehnquist and Justices White, Scalia, and Thomas would have overruled *Roe* and applied rational basis review to the state's regulations. Applying that review, they would have upheld all the state's restrictions; thus, along with the joint opinion's votes, they created a seven-justice majority for upholding the parental notification and 24-hour "informed consent" provisions. The several opinions through which this bloc spoke raised arguments that will reappear in the majority opinion that overruled *Roe* and *Casey*, *Dobbs v. Jackson Women's Health Organization* (2022), the next excerpted case in these materials.

4. As quoted above, the *Casey* joint opinion aspired to "call the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." Rhetoric aside, they clearly hoped to quiet the abortion wars by firmly reestablishing a woman's right to have an abortion while acknowledging states' interest in encouraging women to bring their pregnancies to term. That hope proved futile, however. In the three decades after *Casey*, anti-abortion forces continued to push for restrictions on the procedure. In so doing, they both defended those restrictions as consistent with *Casey* and also attacked *Casey* and *Roe*.

5. The first wave of post-*Casey* abortion restrictions centered on so-called "partial-birth" abortions. That term is not a medical one; rather, it refers generally to abortions that are per-

formed in late stages of pregnancy and that involved the partial extraction of the fetus from the womb prior to its destruction. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), a 5-justice majority struck down a Nebraska law banning this procedure. The Court, speaking through Justice Breyer, faulted the law for its vague definition of the banned procedure. It also held that the law failed *Casey*'s undue burden standard by not providing an exception for the woman's health. The state had argued that the banned procedure was never medically necessary to protect women's health, but the Court concluded that the state had failed to prove that point. However, seven years later, in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), a different five-justice majority upheld a federal law banning that practice. The majority concluded that the federal statute defined the banned procedure with sufficient precision. It also noted that Congress had found that the procedure was never medically necessary, a finding to which the Court deferred. *Gonzalez* was decided by a Court that included two justices who had been appointed since *Stenberg*. Chief Justice Roberts replaced Chief Justice Rehnquist, and Justice Alito replaced Justice O'Connor. That latter switch was decisive: Justice Alito joined the majority in *Gonzalez* while Justice O'Connor, who had co-authored the joint opinion in *Casey*, had voted to strike down the Nebraska partial-birth ban in *Stenberg*.

6. After *Gonzalez*, attention shifted to states' attempts to regulate abortion facilities, ostensibly in order to protect the health of women seeking abortions in those facilities. The all-but explicitly-stated goal of many of these laws was to impose sufficiently onerous conditions on abortion providers such that those providers would reduce their operations or shut down entirely. In *Whole Women's Health v. Hellerstedt*, 579 U.S. 582 (2016), a five-justice majority struck down a Texas law that imposed a variety of requirements on abortion providers, finding them to confer no medical benefits while imposing costs on providers that significantly reduced the number of abortion providers in the state and thus imposed a substantial obstacle to women seeking abortions. For those reasons the Court found the law to impose an undue burden. Three justices dissented. (Justice Scalia had died by the time the opinion was announced.)

Four years after *Hellerstedt*, the Court used analogous reasoning to strike down a Louisiana law that imposed similar regulations. *June Medical Services v. Russo*, 140 S.Ct. 2103 (2020). However, only four justices joined the plurality opinion. Chief Justice Roberts, who had dissented in *Hellerstedt*, concurred in the judgment in *June Medical* on *stare decisis* grounds. Nevertheless, he disagreed with how the *Hellerstedt* majority and *June Medical* plurality had applied *Casey*. He argued that *Casey* did not call for courts to balance the medical benefits of the challenged legal requirement against the woman's liberty interest; rather, he said, the only question for courts was whether the law placed a substantial obstacle in the woman's path to seeking an abortion. Four justices dissented.

7. In September, 2020, Justice Ruth Bader Ginsberg died and was replaced by Justice Amy Coney Barrett. The following May, the Court granted *certiorari* in *Dobbs v. Jackson Women's Health Organization*, which involved a challenge to a Mississippi law banning most

abortions after 15 weeks. The Mississippi law clearly violated *Casey* by prohibiting abortions before fetal viability. At the Court, Mississippi argued that its law was nevertheless consistent with *Roe* and *Casey*; however, it suggested that if the Court disagreed it should reconsider those precedents.

D. The End of the Abortion Right

Dobbs v. Jackson Women's Health Organization
142 S.Ct. 2228 (2022)

Justice ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade* (1973) (*Supra.* this Chapter]. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life," it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court ended up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2] …

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) [Note *supra.* this Chapter], the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion

[2] J. Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973).

did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion. But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. … But the three Justices who authored the controlling opinion "called the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. …

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. …

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702 (1997) [*Infra.* Chapter 10].

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s

"central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

… The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded ... in the Ninth Amendment's reservation of rights to the people." Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe* expressed the "feeling" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[*] The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretext designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484 (1974).… Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

---

[*] [Ed. Note: The equal protection status of sex discrimination is examined in Chapter 12.]

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833) [Note *supra.* Chapter 8], but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in our history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Glucksberg*.[19] And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. …

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing." In a well-known essay, Isaiah Berlin reported that "historians of ideas" had cataloged more than 200 different senses in which the term had been used.

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. "Substantive due process has at times been a treacherous field for this Court," *Moore v. East Cleveland* (1977) (plurality opinion) [*Infra.* Chapter 10], and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. As the Court cautioned in *Glucksberg*, "we must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."

On occasion, when the Court has ignored the "appropriate limits" imposed by "respect for the teachings of history," *Moore*, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905) [*Supra.* Chapter 7]. The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of

[19] See also, *e.g., Palko v. Connecticut* (1937) (requiring "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") [*Supra.* Chapter 8].

our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

2

a

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.[24]

The "eminent common-law authorities …" *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." [Justice Alito then cited other English legal authorities from the 17th and 18th Centuries to the same effect.] And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor." …

[24] The exact meaning of "quickening" is subject to some debate. We need not wade into this debate. First, it suffices for present purposes to show that abortion was criminal by at least the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period—i.e., the period surrounding the enactment of the Fourteenth Amendment—the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. …
In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries" reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor" …. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died.

The few cases available from the early colonial period corroborate that abortion was a crime. …

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. … The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a separate and independent existence." …

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. … In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation."
In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). …

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people."

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. …

3

Respondents and their *amici* have no persuasive answer to this historical evidence. …

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy." *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. ... Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia* (1967) [*Infra.* Chapter 13]; the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut* (1965) [*Supra.* this Chapter], *Eisenstadt v. Baird*, 405 U.S. 438 (1972) [Note *supra.* this Chapter]; the right to reside with relatives, *Moore v. East Cleveland* (1977) [*Infra.* Chapter 10]; the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) [Note *supra.* Chapter 8]; *Meyer v. Nebraska* (1923) [*Supra.* Chapter 8]; the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) [Note *supra.* Chapter 8]; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Rochin v. California*, 342 U.S. 165 (1952) [Note *supra.* Chapter 8]. Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* (2003) (right to engage in private, consensual sexual acts) [*Infra.* Chapter 10], and *Obergefell v. Hodges* (2015) (right to marry a person of the same sex) [*Infra.* Chapter 10].

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license funda-

mental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Roe* and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "deeply rooted" one, "in this Nation's history and tradition." The dissent does not identify *any*

pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States.[47]

[47] By way of contrast, at the time *Griswold* was decided, the Connecticut statute at issue was an extreme outlier.

The dissent's failure to engage with this long tradition is devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "deeply rooted in this Nation's history and tradition" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*. But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy. …

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe* (dissenting opinion), and while the dissent claims that its standard "does not mean anything goes," any real restraints are hard to discern. …

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance. …

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has

passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life."

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. It "contributes to the actual and perceived integrity of the judicial process." And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. …

We have long recognized, however, that *stare decisis* is "not an inexorable command," and it "is at its weakest when we interpret the Constitution." It has been said that it is sometimes more important that an issue "be settled than that it be settled right." But when it comes to the interpretation of the Constitution … we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education* (1954) [*Infra.* Chapter 13], the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson* (1896) [*Infra.* Chapter 13], along with six other Supreme Court precedents that had applied the separate-but-equal rule.

In *West Coast Hotel Co. v. Parrish* (1937) [*Supra.* Chapter 7], the Court overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525 (1923) [Note *supra.* Chapter 7], which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York* (1905) (holding invalid a law setting maximum working hours) [*Supra.* Chapter 7].

Finally, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. …Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have at-

tempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others. …

Roe was … egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed. …

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe* (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. …

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds. …

b

… *Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. … *Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested—contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority—that the common law had probably never really treated post-quickening abortion as a crime. This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. … The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional "right of personal privacy," but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal

decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce* (right to send children to religious school); *Meyer* (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving* (right to marry a person of a different race), or procreation, *Skinner* (right not to be sterilized); *Griswold* (right of married persons to obtain contraceptives); *Eisenstadt* (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. …

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb."

As Professor Laurence Tribe has written, "clearly, this mistakes a definition for a syllogism." …

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. …

d

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. …

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. … The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its

much-criticized discussion of viability. … Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe.*"

The controlling opinion criticized and rejected *Roe*'s trimester scheme, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

Casey, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent. …

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s "undue burden" test has scored poorly on the workability scale. …

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. …

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? …

The third rule complicates the picture even more. Under that rule, *"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." This rule contains no fewer than three vague terms. It includes the two already discussed—"undue burden" and "substantial obstacle"—even though they are inconsistent. And it adds a third ambiguous term when it refers to "*unnecessary* health regulations." The term "necessary" has

a range of meanings—from "essential" to merely "useful." *Casey* did not explain the sense in which the term is used in this rule. …

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." …

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. …

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people had organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights."

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa* (1963) [*Supra.* Chapter 7].

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States (citing *Obergefell*; *Lawrence*; *Griswold*). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "abortion is a unique act" because it terminates "life or potential life." And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*.

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. …

The *Casey* plurality "called the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. That unprecedented claim exceeded the power vested in us by the Constitution. … Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. … Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. … This Court cannot bring about the permanent resolu-

tion of a rancorous national controversy simply by dictating a settlement and telling the people to move on. …

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives. …

V

B

* * *

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. That opinion … recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." The concurrence would "leave for another day whether to reject any right to an abortion at all," and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances."

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. …

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "discard" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation." Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. That is simply incorrect. *Roe*'s trimester rule was expressly tied to viability, and viability played a critical role in later abortion decisions. …

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*'s "central holding." ...

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*. …

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*.

A law regulating abortion, like other health and welfare laws, … must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. …

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

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

Justice THOMAS, concurring.
I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty"

protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Glucksberg*. …

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbid the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." …

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold*, *Lawrence*, and *Obergefell* are not at issue. The Court's abortion cases are unique, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," Thus, I agree that "nothing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. …

Justice KAVANAUGH, concurring. [omitted]

Chief Justice ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. i. That question is directly implicated here: Mississippi's Gestational Age Act generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe* and *Casey*.

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as "viable" outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), included *any* gestational age limit. No party or *amicus* asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument.

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. … As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb. …

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed "telling that other countries almost uniformly eschew" a viability line. The Court rightly rejects the arbitrary viability rule today.

II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. … Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." … To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding. … But simply declaring it does not make it so. The ques-

tion in *Roe* was whether there was any right to abortion in the Constitution. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed. …

III

… The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case. …

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

* * *

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.
For half a century, *Roe* and *Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. … So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and

meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. Today, the Court discards that balance. … Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child. …

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "the ability of women to participate equally in this Nation's economic and social life." *Casey*. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. …

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold*; *Eisenstadt*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence*; *Obergefell*. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "casts doubt on precedents that do not concern abortion." But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals."

Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere —and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. … We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. … But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." …

At the same time, though, the Court recognized "valid interests" of the State "in regulating the abortion decision." The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding the health" of the woman. No "absolutist" account of the woman's right could wipe away those significant state claims.

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. … In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. …Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. …

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. … So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. At that point, a "second life" was capable of "independent existence." If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on [the developing child's] behalf." At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promote prenatal life." In particular, the State could ensure informed choice and could try to promote childbirth. But the State still could

not place an "undue burden"—or "substantial obstacle"—"in the path of a woman seeking an abortion." …

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. … The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one. …

The majority's core legal postulate … is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. … If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." … Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. …

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders … knew they were writing a document designed to apply to ever-changing circumstances over centuries." Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland*

(1819) [*Supra.* Chapters 3 and 4]. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. …

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." … For now, our point is … that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497 (1961) (dissenting opinion) [Note *supra.* Chapter 8]. Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans … have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decision-making. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See *ante* (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably "license fundamental rights" to illegal "drug use [and] prostitution"). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination. …

Consider first, then, the line of this Court's cases protecting "bodily integrity." "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891). So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, *e.g.*, *Rochin*.

Casey recognized the "doctrinal affinity" between those precedents and *Roe*. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. …

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. … Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them. For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. …

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. … That right is unique, the majority asserts, "because [abortion] terminates life or potential life." … Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice THOMAS's concurrence—which makes clear he is not with the program. … Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. … The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest …. According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner* not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. …

II

… By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. …

… *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." …

… Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. …

In any event "whether or not we ... agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. So how does that approach prevent the "scale of justice" from "wavering with every new judge's opinion"? It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day. …

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. … But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no

doubt seeing their slimness. The majority briefly invokes the current controversy over abortion. But it has to acknowledge that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. … In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of "obsolete constitutional thinking."

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. … The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. …
In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

2

In support of its holding, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co. v. Parrish* and *Brown v. Board of Education*. But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is.

West Coast Hotel overruled *Adkins v. Children's Hospital*, and a whole line of cases beginning with *Lochner v. New York*. *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkin*s's assumption that a wholly unregulated market could meet basic human needs. … In *West Coast Hotel*, the Court caught up, recognizing through the lens of experience the flaws of existing legal doctrine. …

Brown overruled *Plessy v. Ferguson*, along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent inequality." Segregation was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*'s time, the *Brown* Court explained, both experience and "modern authority" showed the "detrimental effects" of state-sanctioned segregation: It "affected [children's] hearts and minds in a way unlikely ever to be undone. By that point, too, the law had begun to reflect that understanding. … Changed facts and changed law required *Plessy*'s end. … But that would not be true of a reversal of *Roe*—"because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed." *Casey*. …

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. … By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections. The disruption of overturning *Roe* and *Casey* will therefore be profound. …

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. That expectation helps define a woman as an "equal citizen," with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. … Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense. …

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abor-

tion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today's majority had done likewise. …

III

"Power, not reason, is the new currency of this Court's decisionmaking." *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court. …

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

Note: *Roe v. Wade*, 1973-2022

1. Regardless of one thinks about the law or policy of abortion, the trajectory of the abortion right is remarkable. In 1973, the Court decided *Roe* by a 7-2 majority. A mere 19 years later in *Casey*, four justices would have overruled *Roe*, and the three-Justice joint opinion never explicitly endorsed it, choosing instead to ground their reaffirmation of *Roe* on *stare decisis* grounds. Thirty years after *Casey*, a five-justice majority finally accomplished that overruling, while a sixth justice, Chief Justice Roberts, would have abandoned the viability line that the *Casey* joint opinion identified as *Roe*'s "essential holding." Just as remarkably, as you'll see in Chapter 12, during this same fifty-year period the Court's serious consideration of women's equality claims under the Equal Protection Clause matured from a new and tentative innovation to a largely uncontroversial mainstay of the Court's individual rights jurisprudence, yet *Dobbs* casually dismissed the sex equality argument for the abortion right. For Americans who, for better or worse, have grown accustomed to the existence of a constitutionally-guaranteed right to an abortion, *Dobbs* stands as a reminder that law can change—sometimes quite significantly.

2. Justice Alito's majority opinion sharply critiques both *Roe* and *Casey*, but it reserves its harshest criticism for *Roe*, calling it "egregiously wrong." Leave aside its critique of the trimester framework, which, as you saw in *Casey*, had been discarded by the time the Court decided *Dobbs*. What else about *Roe* did the *Dobbs* majority find so objectionable? What do you think about that critique? Do you find the dissent's defense of *Roe* convincing? Why or why not?

3. Recall that Justice Rehnquist's dissent in *Roe* noted that, in 1868, most of the states then in existence banned abortion. Justice Alito's majority opinion in *Dobbs* stresses this fact, with which the *Dobbs* dissent does not disagree. How weighty should that fact be in determining whether the Due Process Clause protects the right to abortion? How can the *Dobbs* dissent concede this fact while still insisting that *Roe* correctly found a right to abortion? What do you think of the dissent's argument?

4. The *Dobbs* majority concludes that the right to abortion, as *Roe* and *Casey* analyzed it, was not supported by the precedents those cases cited. While you have not yet seen some of those cases (they will be presented in the next chapter), recall from the majority opinion that they deal with issues such as marriage, sexual intimacy, contraception, child rearing, family living arrangements, and forced medical treatment. How do those rights relate to the abortion right? How are they different? Leaving aside the state's interest in regulating any of those rights or abortion itself, who has the better argument about whether the abortion right fits within the fabric of the law created by those precedent cases recognizing those liberty interests? Recall that the *Dobbs* majority insists that none of those other rights has been "undermined" by its decision. Recall also the dissent's skepticism about that claim. Which side do you find more convincing? After you read those other cases in Chapter 10, you will be asked to reconsider this question.

5. Consider now the Justices' debate about *stare decisis*. Justice Alito finds *Roe* and *Casey* unworthy of reaffirmation as a matter of *stare decisis*, while the dissent reaches the opposite conclusion. What accounts for that difference, aside from the fact that the two sides disagree over whether *Roe* and *Casey* were correct when initially decided? In particular, consider the two sides' disagreement over whether *Roe* and *Casey* have engendered reliance interests that justify reaffirming those cases. Who has the better argument on that point?

6. Consider now Chief Justice Roberts' concurrence. He insists that his more limited rationale for upholding Mississippi's law reflects an appropriate reluctance to decide more than what is necessary to resolve the case in front of the Court. By contrast, the majority opinion argues that the Chief Justice's "reasonable opportunity" to procure an abortion approach is just as constitutionally unsupported as *Roe* and *Casey*'s viability line. Who has the better argument on this point? Would the Chief Justice's proposed resolution of *Dobbs* have merely postponed the inevitable day when the Court would have to decide whether to overrule *Roe*? If so, is there any value to delaying that day via his incremental, minimalist, approach?

7. In addition to overruling *Roe* and *Casey* and repudiating the abortion right those cases recognized, *Dobbs* also had much to say about the proper methodology for recognizing substantive due process rights more generally. Indeed, in reading *Dobbs* you have may noticed many references to cases presented in Chapter 10 when the *Dobbs* excerpt discusses substantive due process. The next chapter considers how the modern Court has thought about substantive due process rights, and presents the due process cases *Dobbs* cites that you haven't already encountered. That chapter proceeds chronologically, so you can witness how later opinions have reacted to earlier Court statements on this issue. That chapter ends with a note on *Dobbs*' contribution to substantive due process methodology beyond the abortion context, and what *Dobbs* might mean for substantive due process rights other than abortion.

Chapter 10: Modern Due Process Methodologies

***Insert at page 672, 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 the end of page 699:

Note: *Dobbs* and the Future of Substantive Due Process

1. In *Dobbs v. Jackson Women's Health Organization* (2022) (*Supra.* Chapter 9), the Court overruled *Roe v. Wade* (1973) (*Supra.* Chapter 9) and *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992) (Note *supra.* Chapter 9). As part of their analyses of the abortion right, the majority and dissenting opinions in *Dobbs* addressed substantive due process analysis more generally. This note considers what they said, and what it might mean for the future course of substantive due process analysis.

2. The majority began its analysis of the abortion issue by considering the proper methodology for analyzing substantive due process questions in general. Speaking for that five-Justice majority, Justice Alito wrote as follows:

> In deciding whether a right [has the status of an unenumerated due process fundamental liberty], the Court has long asked whether the right is "deeply rooted in our history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Glucksberg*. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. …
>
> Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. …

> In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. "Substantive due process has at times been a treacherous field for this Court," *Moore v. East Cleveland* (1977) [*Supra.* this Chapter], and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. As the Court cautioned in *Glucksberg*, "we must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."
>
> On occasion, when the Court has ignored the "appropriate limits" imposed by "respect for the teachings of history," *Moore*, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905) [*Supra.* Chapter 7]. The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

Applying these principles, the majority turned to the historical status of abortion, consulting English sources dating back to the 13th Century, before focusing heavily on the fact that most states banned abortion when the Fourteenth Amendment was ratified in 1868.

Later in his analysis, Justice Alito continued to discuss his preferred approach to substantive due process:

> Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy." *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."
>
> The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free to think and to say what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free to act in accordance with those thoughts.

> License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty." …
>
> Nor does the right to obtain an abortion have a sound basis in precedent. Casey relied on cases involving the right to marry a person of a different race, *Loving v. Virginia* (1967) [*Infra.* Chapter 13]; the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut* (1965) [*Supra.* Chapter 9], *Eisenstadt v. Baird*, 405 U.S. 438 (1972) [Note *supra.* Chapter 9], the right to reside with relatives, *Moore v. East Cleveland* (1977) [*Supra.* this Chapter]; the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) [Note *supra.* Chapter 8], *Meyer v. Nebraska* (1923) [*Supra.* Chapter 8]; the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) [Note *supra.* Chapter 8]; and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Rochin v. California*, 342 U.S. 165 (1952) [Note *supra.* Chapter 8]. Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* (2003) (right to engage in private, consensual sexual acts) [*Supra.* this Chapter], and *Obergefell v. Hodges* (2015) (right to marry a person of the same sex) [*Supra.* this Chapter].
>
> These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

3. Unsurprisingly, the joint dissent of Justices Breyer, Kagan, and Sotomayor expressed a different view on the substantive due process question. The dissent wrote as follows:

> The majority [rejects *Roe* and *Casey*] based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one. …
>
> The majority's core legal postulate … is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. … If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guaran-

tee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. … When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. …

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? … The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders … knew they were writing a document designed to apply to ever-changing circumstances over centuries." Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland* (1819) [*Supra.* Chapters 3 and 4]. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. …

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." … [O]ur point is … that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497 (1961) (dissenting opinion) [Note *supra.*

> Chapter 8]. Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans … have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children. …
>
> Consider first, then, the line of this Court's cases protecting "bodily integrity." "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891). So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, e.g., *Rochin*.
>
> … *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.
>
> And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. … Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them. …

4. The question *Dobbs* unavoidably raised was whether its history based approach to finding due process rights undermined many of the Court's modern due process cases in areas other than abortion. The majority insisted that it did not:

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions ac-

> knowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way. …
>
> … the Solicitor General suggests that overruling [*Roe* and *Casey*] would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States (citing *Obergefell*; *Lawrence*; *Griswold*). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "abortion is a unique act" because it terminates "life or potential life." And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

5. Justice Thomas joined the majority opinion. He fully agreed with the majority's analysis, and also agreed that the majority opinion itself did not undermine cases such as *Griswold*, *Lawrence*, and *Obergefell*. But he wrote the following in his separate concurrence:

> The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold*, *Lawrence*, and *Obergefell* are not at issue. The Court's abortion cases are unique, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," Thus, I agree that "nothing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."
>
> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. …

Justice Thomas identified "at least three dangers [that] favor jettisoning the entire doctrine." "First, substantive due process exalts judges at the expense of the People from whom they derive their authority." … "Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, e.g., *Eisenstadt* (relying on *Griswold* to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain nonfundamental rights, meanwhile, receive only cursory review."

… "Third, substantive due process is often wielded to disastrous ends. For instance, in *Dred Scott v. Sandford*, (1857) [*Infra.* Chapter 13], the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories."

6. The dissent questioned the majority's assurances:

> The first problem with the majority's account comes from Justice THOMAS's concurrence—which makes clear he is not with the program. … Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. … The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest …. According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner* not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. …

7. Clearly, the majority opinion's approach to substantive due process relies heavily on the Court's approach in *Glucksberg*. Did the Court have an obligation at least to explain why the contrary approaches taken in the more recent cases of *Lawrence* and *Obergefell* did not govern? Recall that *Obergefell* itself acknowledged the *Glucksberg* approach, but attempted to explain why it did not apply to the same-sex marriage question. What do you think the implications are of the Court's unwillingness even to consider the Court's embrace of different approaches in post-*Glucksberg* cases?

The dissent's discussion of *Dobbs*' implication for other substantive due process rights acknowledged the majority's disclaimer. But, among other things, it noted that a future Court would be the one to decide whether to apply *Dobbs*' approach in other due process contexts. Are there reasons to believe that the future Court would or would not apply *Dobbs*?

8. As you leave this chapter's discussion of substantive due process, what do you make of the Court's overall jurisprudence in this area? Why do you think the Court has been so inconsistent in its methodology? Is that inconsistency a signal that substantive due process is resistant to principled application, or is it simply a reflection of the Justices' disagreement on those basic methodological issues and its unwillingness to be bound by precedents embracing methodologies which a current majority disagrees? More generally, consider Justice Alito's charge that broader methodologies for identifying substantive due process rights recreate "the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*." Critics of expansive due process rights very often point (disapprovingly) to *Lochner* as the inspiration for such methodologies, or at least their logical endpoint. The *Dobbs* dissent denies the charge. Does the dissent persuade you that it can avoid *Lochner*?

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 778, 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?

Chapter 13: Race and the Constitution

E. Race Consciousness Today

Delete the material between pages 901 and 928 and replace with the following:

Note: Affirmative Action in Education Between *Bakke* and *Students for Fair Admissions*

1. As noted earlier in this chapter, *Bakke* was a deeply fractured decision. Nevertheless, five justices agreed that universities had a compelling interest in obtaining the educational benefits of enrolling a diverse class of students. By the turn of the 21st century, however, the Court's narrow but firm insistence on applying strict scrutiny to all racial classifications raised questions about the continued viability of race-based affirmative action in higher education. In a series of cases decided between 2003 and 2016, the Court seemed to solidify the role for such practices, while also imposing limitations on them.

2. In 2003, the Court decided two cases involving challenges to the University of Michigan's admissions policies. *Grutter v. Bollinger*, 539 U.S. 306 (2003) involved a challenge to the university's law school's policy. That policy entailed the law school's consideration of an applicants' race, but, according to the Court, only as one part of a holistic examination of each applicant's characteristics, as relevant for determining what that applicant could add to the mixture of perspectives and viewpoints held by members of the admitted class.

Justice O'Connor's opinion for five justices upheld the law school's policy. She began by adopting, now for a Court majority, Justice Powell's solo *Bakke* opinion accepting diversity as a compelling interest in the context of higher education admissions. The Court then held that the law school's admissions policies satisfied strict scrutiny. Justice O'Connor explained that "strict" scrutiny was not invariably "fatal in fact," and that, instead, "context matters" when applying that scrutiny level.

Applying those observations to the law school's policy, she explained that the law school merited deference when it determined that diversity was essential to its educational mission. She described its policy as similar to the Harvard plan to which Justice Powell referred approvingly in *Bakke*, in that it treated the applicant's race merely as one diversity factor among many and gave individualized, holistic consideration to each application. Given those characteristics of the law school's policy, the Court concluded that the policy survived strict scrutiny. However, citing what she described as the constitutionally-problematic aspects of government's use of race, she added, toward the end of her opinion, the statement that "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

The four dissenters (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) all wrote separate opinions, some of which were joined by one or more of the other dissenters. A common theme in these dissents was the claim that, in fact, the law school's consideration of minority applicants was designed to ensure the acceptance of enough minority applicants to constitute a consistent proportion of each year's entering class—a practice of racial balancing they argued was unconstitutional.

3. The same day it decided *Grutter*, the Court also decided *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Gratz* involved a challenge to the admissions policy of the University of Michigan's undergraduate college. That policy employed, as part of its decision-making process, a point system in which applicants' various characteristics (for example, their status as an athlete or a Michigan resident) entitled the applicant to extra points toward reaching a threshold that would guarantee admission. In addition to those other characteristics, status as a member of an underrepresented minority entitled an applicant to 20% of the points necessary to attain that threshold.

Six justices held that the Michigan undergraduate policy violated the Equal Protection Clause. Writing for five of those justices, Chief Justice Rehnquist concluded that the provision of automatic points for minority status violated *Grutter*'s requirement of individualized consideration of applicants when race was used as a factor in admissions. Justice Breyer concurred in the judgment. Three justices dissented, arguing that the undergraduate school's policy differed only in form, not substance, from the law school's policy upheld in *Grutter*.

4. A decade later, the Court decided two cases involving a challenge to the University of Texas's undergraduate admissions policy. In *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*), the Court considered the university's use of race, which was justified as ensuring that the university enrolled a "critical mass" of minority students that would achieve its diversity goals. The Court rejected the lower court's analysis, which had deferred to the university not just with regard to the importance of its interest in diversity but also with regard to the means by which the university sought to attain that goal. It thus remanded the case to the lower court, to apply the appropriate level of scrutiny. Justice Kennedy wrote for all members of the Court, except for Justice Ginsburg, who dissented, arguing that the university had complied with the requirements the Court had set out in *Grutter*.

5. *Fisher* returned to the Court three years later. In *Fisher v. University of Texas*, 579 U.S. 365 (2016) (*Fisher II*), the Court affirmed the lower court's decision, on remand after *Fisher I*, upholding the university's policy. Writing for a four-justice majority on a seven-justice Court, Justice Kennedy concluded that the university had satisfied the scrutiny *Grutter* required. In particular, he refused to fault the university for failing to quantify its diversity goals, reasoning that that level of precision would place the university at risk for adopting a de facto quota system of

the sort its prior cases had condemned. Instead, Justice Kennedy concluded that the university had given careful consideration to its diversity goals and the race-conscious means that would achieve them in a sufficiently precise way.

Justice Alito, writing for the three dissenters, argued that the university had failed to satisfy the narrow tailoring required for universities to use race. Justice Thomas issued a separate dissent only for himself, in which he again criticized universities' use of race as unconstitutional.

6. One final school admissions case before 2023 merits discussion. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court considered two school districts' plans for assigning students to primary schools. Those plans used a number of tie-breakers when other criteria (such as a sibling's attendance at a particular school) did not resolve situations where two students had equal claims to a scarce spot in a particular school. One of those tie-breakers was race, with the districts explaining that they used race in this way in order to ensure that students received racially-integrated educational experiences.

A five-justice majority struck down those plans. Writing for that majority, Chief Justice Roberts concluded that, under those plans, when race became a relevant factor in an admissions decision it was the decisive factor, in contrast to the plan approved in *Grutter*. Perhaps counterintuitively, the majority also took issue with the relatively minimal impact the plans' use of race had on the racial composition of the districts' classes, essentially suggesting that the districts' use of race was insufficiently narrowly tailored because it had so little effect in promoting the districts' interests.

A four-justice plurality went further, and faulted the districts for using each district's overall racial demographics as the target for the racial composition of each school, thus essentially imposing a regime of proportional representation unrelated to any independent goal of ensuring a particular level of integration. Justice Kennedy, who furnished the fifth vote for the analysis noted above, did not join this latter part of the opinion. He argued that school districts should have latitude to ensure racial integration, and thus to keep race-based goals in mind as they assigned students, as long as they did not actually assign students based on race.

Four justices dissented. They argued that the districts' plans were consistent with the spirit of *Brown v. Board of Education*, in that they reflected *Brown*'s goal of ensuring that schoolchildren learned in racially-integrated learning environments.

7. The upshot of this post-*Bakke* jurisprudence was that universities could make limited use of race in admissions, in pursuit of creating an entering class that was diverse along a broad set of criteria including but not limited to race. However, universities could use race only as part of a holistic review of all of an applicant's characteristics that might generate diversity. More-

over, after *Grutter*, it was widely understood that such racial preferences might only be valid until 2028.

In 2023, the Court took a case challenging these conclusions.

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

143 S.Ct. 2141 (2023)

Chief Justice ROBERTS delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. … Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. … In assigning the overall rating, the first readers "can and do take an applicant's race into account."

Once the first read process is complete, Harvard convenes admissions subcommittees.… The subcommittees can and do take an applicant's race into account when making their recommendations.

The next step of the Harvard process is the full committee meeting. … At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that Harvard does not have a dramatic drop-off " in minority admissions from the prior class. …

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. The full committee decides as a group which students to lop. In doing so, the committee can and does take race into account. Once the lop process is complete, Harvard's admitted class is set. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

B

… Like Harvard, [the University of North Carolina's ("UNC's")] "admissions process is highly selective" …. [Admissions Office] readers are required to consider "race and ethnicity ... as one factor" in their review. Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. During the years at issue in this litigation, underrepresented minority students were "more likely to score highly on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" …. In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." …

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every initial decision." … The review committee either approves or rejects each admission recommendation made by the first reader …. In making those decisions, the review committee may also consider the applicant's race.[1]

C

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The District Courts in both cases held bench trials to evaluate SFFA's claims. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. The First Circuit affirmed that determination. Similarly, in the UNC case, the District Court con-

---

[1] Justice JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic admissions process," as Justice JACKSON contends. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. The dissent does not dispute the accuracy of these figures. And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality.

The same is true at Harvard. …

cluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. …

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." To its proponents, the Equal Protection Clause represented a "foundational principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." …

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* [1896] [*Supra* this Chapter] the separate but equal regime that would come to deface much of America. …

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education* (1954) [*Supra* this Chapter]. … But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950) [Note *supra* this Chapter]. …

The culmination of this approach came finally in *Brown*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. … The school district maintained that … segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." The mere act of separating "children ... because of their race," we explained, itself "generated a feeling of inferiority."

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*; see also Supp. Brief for Appellants on Reargument ("That the Constitution is color blind is our dedicated belief."). …

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder* (1956) [*Supra* this Chapter], for example, we summarily affirmed a decision invalidating state and local laws that required segregation in busing. … And in *Mayor and City Council of Baltimore* v. *Dawson* (1955) [*Supra* this Chapter], we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses …. As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years

after *Brown*, the Fourteenth Amendment "proscribes ... all invidious racial discriminations." *Loving v. Virginia* (1967) [*Supra* this Chapter]. …

These decisions reflect the "core purpose" of the Equal Protection Clause: "doing away with all governmentally imposed discrimination based on race." … Eliminating racial discrimination means eliminating all of it. …

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.[3] …

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Bakke* …. In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serve as the touchstone for constitutional analysis of race-conscious admissions policies."

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. … Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body."

But a university's freedom was not unlimited. …The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." …

---

[3] The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown*, in the infamous case *Korematsu v. United States* (1944) [*Supra* this Chapter]. … We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 138 S.Ct. 2392 (2018) [Note *supra* this Chapter]. The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." …

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. …

C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) [Note *supra* this Chapter] ….

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "the Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin."

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyping." *Richmond v. J. A. Croson Co.* (1989) (plurality opinion) [*Supra* this Chapter]. Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harmed nonminority applicants."

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. … To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. This requirement was critical, and *Grutter* emphasized it repeatedly. … *Grutter* thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Neither does UNC's. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned

and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

A

Because "racial discrimination is invidious in all contexts," we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial review" under the rubric of strict scrutiny, "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it."

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits ….

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "trained"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve. …

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise "guards against inadvertent drop-offs in representation" of certain minority groups from year to year. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbi-

[4] The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

trary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, such as Jordan, Iraq, Iran, and Egypt," UNC's counsel responded, "I do not know the answer to that question." …

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," and that "deference does not imply abandonment or abdication of judicial review." …

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. … College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter. …

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*. … Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. …We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well. …

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*. Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark" or "precise number or percentage" or "specified percentage." So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." And "if at some point

in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." …

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups …. UNC's admissions program operates similarly.

The problem with these approaches is well established. "Outright racial balancing" is "patently unconstitutional." That is so, we have repeatedly explained, because "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved."…

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. …

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expected that 25 years from now, the use of racial preferences will no longer be necessary." The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. …

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. …But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional.

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. But that minority view was just that—a minority view. …We reached the same conclusion in *Croson*. … The dissents here do not acknowledge any of this. …

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely …. But *Grutter* did no such thing. The principal dissent's reliance on *Fisher v. University of Texas*, 579 U.S. 365 (2026) (Note *supra* this Chapter) is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, whose "goal" it was to enroll a "critical mass" of certain minority students. But neither Harvard nor UNC claims to be using the critical mass concept ….

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. "What cannot be done directly cannot be done indirectly…." … A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race. …

Justice THOMAS, concurring.

… Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. … The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law. …

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "our Constitution is color-blind." It was the view of the Court in *Brown*, which rejected "any authority ... to use race as a factor in affording educational opportunities." And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. …

B

… As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. … The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses… Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. …

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. … In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) [Note *supra* Part III], the Court identified the "pervading purpose" of the Reconstruction Amendments as "the freedom of the slave race… ." Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." Rather, "if Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, the Thirteenth Amendment may safely be trusted to make it void." … The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law. …

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality ideal, as Justice Harlan emphasized in dissent …. For Justice Harlan, the Constitution was colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. … Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel ... needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male

citizen, whether refugee or freedman, ... not more than forty acres of such land." … Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. …

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. At the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because the servicemen did not understand how the payment system operated." Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. Another law, passed in 1867, provided funds for "freedmen or destitute colored people" in the District of Columbia. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves ... lived in densely populated shantytowns." Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undoing the effects of past discrimination in a way that does not involve classification by race," even though they had "a racially disproportionate impact." *Croson* (Scalia, J., concurring in judgment). … In that way, "race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were ... not inconsistent with the colorblind Constitution." …

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County. Even if these statutes provided race-based benefits, they do not support respondents' and Justice SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted. …

III

Both experience and logic have vindicated the Constitution's colorblind rule ….

B

… Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." ... "Indeed, if our history has taught us anything, it has taught us to beware of elites bearing

racial theories." … Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble. …

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. … "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. …

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp blacks and Hispanics with a badge of inferiority." They thus "taint the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." …

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. … Courts are not suited to the impossible task of determining which racially discriminatory programs are helping which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.

… Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. …

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. …

A

It has become clear that sorting by race does not stop at the admissions office. In his *Grutter* opinion, Justice Scalia criticized universities for "talking of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." … In addition to contradicting the universities' claims regarding

the need for interracial interaction, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine. …

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see *The Federalis*t No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. … Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. … Whichever choice he makes … the [admissions] form silos him into an artificial category. Worse, it sends a clear signal that the category matters. …

B

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, color-blind. People discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions ….

Yet, Justice JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. This is so, she writes, because of statistical disparities among different racial groups. … Justice JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long odds.

Nor do Justice JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. …

Justice JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us what is required to level the playing field" among castes and classifications that they alone can divine. … Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. … In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal. …

Though Justice JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." Indeed, Justice JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would Justice JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? …

C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. …

* * *

… The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional.

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

Justice GORSUCH, with whom Justice THOMAS joins, concurring. [omitted]

[Justice Gorsuch focused his concurrence on the statutory non-discrimination claim the plaintiffs raised.]

Justice KAVANAUGH, concurring.

[Justice Kavanaugh's concurring opinion focused on *Grutter*'s imposition of a 25-year limit on its allowance of race-based affirmative action in higher education.]

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join,* dissenting.

… Today, this Court … rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. …

With time, and at the tremendous cost of the Civil War, abolition came. … Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. …

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. [Eventually,] Congress … adopted the Fourteenth Amendment. …Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. For the Bureau, education "was the foundation upon which all efforts to assist the freedmen rested." Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction." …

* [Justice Jackson recused herself from the Harvard case, with her join of Justice Sotomayor's dissent and her own dissenting opinion pertaining only to the University of North Carolina case.]

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and color ... shall have the same rights" as those "enjoyed by white citizens." … In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. …

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for "the relief of destitute colored women and children," without regard to prior enslavement. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. …

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. That endeavor culminated with the Court's shameful decision in *Plessy* ….

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. … Although "the white race deems itself to be the dominant race ... in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior, dominant, ruling class of citizens" in the eyes of the law. In that context, Justice Harlan thus announced his view that "our constitution is color-blind."

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." … *Brown* was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities "solely because of their race," denoting "inferiority as to their status in the community." …

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. [Justice Sotomayor then described the Court's cases requiring states to take affirmative, race-conscious steps to integrate previously segregated schools.]

… [T]his Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restoring race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." …. This Court rejected that characterization of "the thrust of *Brown*." It made clear that indifference to race "is not an end in itself " under that watershed decision. The ultimate goal is racial equality of opportunity. Those rejected arguments mirror the Court's opinion today. … It distorts the dis-

sent in *Plessy* to advance a colorblindness theory. The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued."

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Justice Marshall joined the *Bakke* plurality and "applauded the judgment of the Court that a university may consider race in its admissions process." … The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness. …

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. … Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. … Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty. When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. … It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. … All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions. …

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application of "established law and move on." As Justice THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled."

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. … In the end, however, it is clear why the Court is forced

to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional ….

A

… These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. … After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. … ..

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief.

… Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."

As the District Court found after considering extensive expert testimony, SFFA's proposed race-neutral alternatives do not meet those criteria. All of SFFA's proposals are methodologically flawed because they rest on "terribly unrealistic" assumptions about the applicant pools. … The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

2

Harvard's admissions program is also narrowly tailored under settled law. …Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." …

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a stu-

[25] SFFA and Justice GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Data from those States disprove that theory. …

dent's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." … That is precisely how Harvard's program operates. …

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges and universities cannot define their diversity interest "as some specified percentage of a particular group merely because of its race or ethnic origin." Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not offer expert testimony to support its racial balancing claim." Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." …

III

…

A

…

2

The majority does not dispute that some uses of race are constitutionally permissible. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. … The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions. …

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee v. Florida Bar*, 575 U.S. 43 (2015) (ROBERTS, C. J., for the Court); Thus, although the Members of this majority pay lip service to respondents' "commendable" and "worthy" racial diversity goals, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." …

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. … Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "advantages" underrepresented minority students "at the expense of" other students.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes … [and] diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." ALDC applicants are predominantly white …. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth. …

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled. …

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. … Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-con-

scious admissions policies with no "specified percentages" and no "specific numbers firmly in mind." *Grutter*. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny "fatal in fact." …

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." ... Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. …

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. … *Grutter* simply announced a general "expectation" that "the use of racial preferences would no longer be necessary" in the future. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. …

5

Justice THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." Justice THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice THOMAS relies have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." …

Citing nothing but his own long-held belief, Justice THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions stamp Black and Latino students with a badge of inferiority." Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." ...

Relatedly, Justice THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but Justice THOMAS points to no evidence that affinity groups cause any harm. …

Citing no evidence, Justice THOMAS also suggests that race-conscious admissions programs discriminate against Asian American students. It is true that SFFA "alleged" that Harvard discriminates against Asian American students. ... It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. Justice THOMAS points to no legal or factual error below, precisely because there is none. ...

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

… I join [Justice Sotomayor's] opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants.

…This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." … Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Bakke*.

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. … After the war, Senator John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott v. Sandford* (1857) [*Supra* this Chapter], by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society. Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. …

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all ... keep up this discrimination, and crush to death the hated freedmen." And this Court facilitated that retrenchment. Not just in *Plessy*, but "in almost every instance, the Court chose to restrict the scope of the second founding." … And the betrayal that this Court enabled had concrete effects. … [Justice Jackson then detailed the ways government and private actions had prevented Black persons from accumulating wealth.]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on their own legs." Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U.S. 3 (1883) (dissenting opinion).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark. … From those markers of social and financial unwellness flow others. [Justice Jackson discussed racial gaps in educational and professional achievement and health outcomes.]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why. Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. …

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity

of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. … UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria." … The process is holistic, through and through." …

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity. And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application." …

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission. There are no race-based quotas in UNC's holistic review process. In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally. And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents."

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced)....

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. …

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race. …

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality. The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates). …

B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter. …

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish. …

Note: *SFFA* and the Role of Race in Higher Education Admissions

1. As an introductory matter to this complex case, note that Chief Justice Roberts' majority opinion characterizes the Court's holding as one resting on the Equal Protection Clause, even though the case involves both a state university (UNC) and a private one (Harvard). As may have already learned, the Fourteenth Amendment only restricts state action, a concept that is further developed in Chapter 18 of this book. In a footnote, the majority opinion says the following about how its equal protection analysis applies to Harvard: "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244 (2003) [Note *supra* this Chapter]. Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself."

2. Chief Justice Roberts' and Justice Sotomayor's dueling opinions in *SFFA* disagree on almost everything. Try to identify those disagreements. To what extent are they factual and to what extent do they concern the rule of law that either does or should apply? With regard to their legal disagreements, which justice has the better claim to be consistent with *Bakke* and the post-*Bakke* precedents laid out in the note that preceded the *SFFA* excerpt?

3. A fundamental disagreement between the opinions of the justices in the majority and those in the dissent concerns which side has the better claim to cite *Brown* for its position. As the note immediately after *Brown* explained, that opinion has become a central part—perhaps *the* central part—of the Court's equal protection doctrine. Now that you've come to the end of the material that explicitly focuses on race, which side do you think has the better claim to *Brown*?

4. Justice Thomas's opinion attempts, among other things, to provide an originalist defense of his colorblindness argument. How persuasive is he? Why or why not? More generally, does his opinion make you more or less amenable to originalism as a methodology for interpreting the Constitution?

5. Consider aspects of the debate between Justices Thomas and Jackson. How does Justice Jackson connect race-based affirmative action with the racially disparate economic, professional, health, and other outcomes she cites? How does Justice Thomas respond? Reconsider this disagreement after you study the intent requirement in the next chapter.

6. Finally, consider the carve-outs in Chief Justice Roberts' opinion. First, why do you think he creates a potential exemption to the Court's rule for the military service academies, such as West Point? Second, consider the majority's willingness to allow applicants to discuss in their

admissions essays how race impacted their upbringing and shaped their identities. How big of a loophole is this? If you were asked by a university admissions office how exactly the university could consider such statements in those essays, what would you say? Does your answer surprise you? Why or why not?

Chapter 14: The Intent Requirement

***Insert at Page 951, before the Note*:**

Note: Two Examples 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 lower court cases provide examples 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 courts 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 or P–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.

> 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.

---

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

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. Con-

cerned 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. . . .

Jones v. DeSantis
2020 WL 2618062 (N.D. Fl. 2020)

[For nearly two centuries, Florida has prohibited felons from voting. In 2018, Florida voters enacted a constitutional amendment by referendum which restored voting rights to most felons "upon completion of all terms of [the felon's] sentence." In 2019, the Florida Legislature enacted a statute, SB7066, which explicitly included financial obligations within the "terms of sentence" that must be satisfied in order for a felon to have his voting rights restored. These obligations included fines, costs, and restitution awards. The Florida Supreme Court later interpreted "all terms of sentence" to include those obligations, but did not address what constituted "completion" of those obligations. SB7066 pre-dated that judicial interpretation of Amendment 4; moreover, it defined those obligations to

include fines, costs, and restitution awards that, as often happens in Florida, were converted into civil liens at the time of sentencing. This conversion takes collection of those obligations out of the criminal justice system and places them in the civil justice system. SB7066 nevertheless required such civil obligations to be satisfied before a felon could regain voting rights.

The inequality alleged in *Jones* was based on the fact that felons who have paid or were able to pay their financial obligations had their voting rights restored, while those who could not pay remained ineligible to vote. The court eventually held that the law unconstitutionally burdened the right to vote based on wealth. In addition to that successful claim, the plaintiffs made a variety of other claims, including claims that that the law discriminated on the basis of both race and gender. The court's discussion of those claims is excerpted here.]

XI. Race Discrimination

The Gruver plaintiffs assert a claim of race discrimination. This order sets out the governing standards and then turns to the claims and provisions at issue.

A. The Governing Standards

To prevail on a claim that a provision is racially discriminatory, a plaintiff must show that race was a motivating factor in the provision's adoption. *See*, *e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977) [Note *supra.* this Chapter]; Washington v. Davis (1976) [*Supra.* this Chapter]. A racially disparate impact is relevant to the question whether race was a motivating factor, but in the absence of racial motivation, disparate impact is not enough.

If race was a motivating factor, the defendant may still prevail by showing that the provision would have been adopted anyway, even without the improper consideration of race.

B. Amendment 4

The plaintiffs make no claim that race was a motivating factor in the voters' approval of Amendment 4. The amendment was intended to restore the right to vote to a large number of felons. It was an effort to expand, not contract, the electorate. Most voters probably were aware that the proportion of African Americans with felony convictions exceeds the proportion of whites with felony convictions—this is common knowledge. But if anything, the voters' effort was to restore the vote to African American felons, as well as all other felons, not to withhold it.

C. The Florida Supreme Court Ruling

The plaintiffs also do not assert the Florida Supreme Court was motivated by race when it issued its advisory opinion holding that "all terms of sentence," within the meaning of Amendment 4, include financial obligations.

D. SB7066

The plaintiffs do assert that SB7066 was motivated by race. The State makes light of the argument, asserting that SB7066 merely implements Amendment 4, and that SB7066, like Amendment 4, expands, not contracts, the electorate. But that is not so. SB7066 includes many provisions that go beyond Amendment 4 itself, including some that limit Amendment 4's reach in substantial respects. Amendment 4 had already expanded the electorate; SB7066 limited the expansion.

The State also offers lay opinion testimony that key legislators were not motivated by racial animus—testimony that would not be admissible over objection, proves nothing, and misses the point. It is true, and much to the State's credit, that the record includes no evidence of racial animus in any legislator's heart—no evidence of racially tinged statements, not even dog whistles, and indeed no evidence at all that any legislator harbored racial animus.

Under *Arlington Heights*, though, the issue is not just whether there was racial animus in any legislator's heart, nor whether there were other reasons, in addition to race, for a legislature's action. To establish a prima facie case, a plaintiff need only show that race was a motivating factor in adoption of a challenged provision.

The issue is far more serious than the State recognizes. Indeed, the issue is close and could reasonably be decided either way.

Four aspects of SB7066 are adverse to the interests of felons seeking reenfrachisement and are worthy of discussion here.

SB7066's most important provision, at least when it was adopted, defined "all terms of sentence," as used in Amendment 4, to include financial obligations. The Florida Supreme Court later ruled that this is indeed what this phrase means, rendering this part of SB7066 inconsequential. This does not, however, establish that the Legislature's treatment of this issue was not motivated by race.

When SB7066 was enacted, it was possible, though not likely, that the court would reach a different result. More importantly, it was possible the court would not rule on this issue before the 2020 election, and that felons with unpaid financial obligations would be allowed to register and vote. Indeed, this was already occurring. Some Supervisors of Elections believed Amendment 4 did not apply to financial obligations. So SB7066's provision requiring payment of financial obligations was important.

SB7066's second most important provision was probably its treatment of judicial liens. Florida law allows a judge to convert a financial obligation included in a criminal judgment to a civil lien. Judges often do this, usually because the defendant is unable to pay. The whole point of conversion is to take the obligation out of the criminal-justice system—to allow the criminal case to end when the defendant has completed any term in custody or on supervision.

When a defendant's criminal case is over, and the defendant no longer has any financial obligation that is part of or can be enforced in the criminal case, one would most naturally conclude the sentence is complete. The Senate sponsor of [a competing bill] advocated this view. But the House sponsor's contrary view prevailed, and, under SB7066, conversion to a civil lien does not allow the person to vote.

This result is all the more curious in light of the State's position in this litigation that when a civil lien expires, the person is no longer disqualified from voting. So the situation is this. The State says the pay-to-vote system's legitimate purpose is to require compliance with a criminal sentence. When the obligation is removed from the criminal-justice system, the person is still not allowed to vote. But when the obligation is later removed from the civil-justice system—when the civil lien expires—the person can vote. Curious if not downright irrational.

In any event, it cannot be said that on the subject of civil liens, SB7066 simply followed Amendment 4.

The third SB7066 provision that bears analysis is the registration form it mandates. The form is indefensible, provides no opportunity for some eligible felons to register at all, and is sure to discourage others. It is so obviously deficient that its adoption can only be described as strange, as was the Legislature's failure to correct it after the State was unable to defend it in any meaningful way in this litigation and actively sought a legislative cure.

The fourth aspect of SB7066 that warrants attention is its failure to provide resources to administer the system the statute put in place. The Legislature was provided information on needed resources and surely knew that without them, the system would break down. SB7066 provided no resources.

SB7066 included many other provisions, some favorable to felons seeking reenfranchisement. The issue on the plaintiffs' race claim is not whether by enacting SB7066, the Legislature adopted the only or even the best reading of Amendment 4 or implemented the amendment in the best possible manner. The issue is whether the Legislature was motivated, at least in part, by race.

SB7066 passed on a straight party-line vote. Without exception, Republicans voted in favor, and Democrats voted against. The defendants' expert testified that felon reenfrachisement does not in fact favor Democrats over Republicans. He based this on studies that might or might not accurately reflect the situation in today's Florida and might or might not apply to felons with unpaid LFOs as distinguished from all felons. What is important here, though, is not whether the LFO requirement actually favors Democrats or Republicans, but what motivated these legislators to do what they did.

When asked why, if reenfranchisement has no partisan effect, every Republican voted in favor of SB7066 and every Democrat voted against, the State's expert suggested only a single explanation: legislators misperceived the partisan impact. As he further acknowledged, it is well known that African Americans disproportionately favor Democrats. He suggested no other reason for the legislators' posited misperception and no other reason for the straight party-line vote.

This testimony, if credited, would provide substantial support for the claim that SB7066 was motivated by race. If the motive was to favor Republicans over Democrats, and the only reason the legislators thought these provisions would accomplish that result was that a disproportionate share of affected felons were African American, prohibited racial motivation has been shown. The State has not asserted the Legislature could properly consider party affiliation or use race as a proxy for it and has not attempted to justify its action under *Hunt v. Cromartie*, 526 U.S. 541 (1999) (noting that a state could engage in political gerrymandering, "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact"). . . .

Before turning to the contrary evidence, a note is in order about two items that do not show racial motivation.

First, the House sponsor of SB7066 emphatically said during legislative debate that the bill was simply a faithful implementation of Amendment 4—in effect, "nothing to see here." This is not true. SB7066 included much that was not in Amendment 4, even as later construed by the Florida Supreme Court. The plaintiffs say this "faithful steward" argument was a pretext to hide racial motivation. And the plaintiffs are correct that pretextual arguments often mask prohibited discrimination. But there are other, more likely explanations for the sponsor's argument. It was most likely intended simply to garner support for SB7066 and perhaps to avoid a meaningful discussion of the policy choices baked into the statute. The argument says nothing one way or the other about the policy choices or motivation for the legislation.

Second, the House sponsor also said during debate that he had not sought information on racial impact and had not considered the issue at all. The plaintiffs say this shows willful blindness to the legislation's obvious racial impact and was again a pretext for racial discrimination. Properly viewed, however, the sponsor's statement does not show racial motivation. It probably shows only an awareness that a claim of racial discrimination was possible, perhaps likely, and a reasonable belief that, if the sponsor requested information on racial impact, the request would be cited as evidence of racial bias. *See*, *e.g.*, *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (citing the request for and use of data on race in support of a finding of intentional race discrimination in voting laws). And while any suggestion that the sponsor did not know SB7066 would have a racially disparate impact could reasonably be labeled pretextual, that is not quite what the sponsor said. On any fair reading, the sponsor's assertion was simply that race should not be a factor in the analysis—an entirely proper assertion. The statement says nothing one way or the other about whether perceived partisan impact was a motivating factor for the legislation, about whether the perceived partisan impact was based on race, or about whether race was thus a motivating factor in the passage of SB7066.

In sum, the plaintiffs' race claim draws substantial support from the inference—in line with the testimony of the State's own expert—that a motive was to support Republicans over Democrats, coupled with the legislators' knowledge that SB7066 would have a disparate impact on African Americans, who vote for Democrats more often than for Republicans. The plaintiffs' other evidence adds little.

There are also other explanations for these SB7066 provisions, as well as evidence inconsistent with the inference of racial motivation.

First, a substantial motivation for the SB7066 definition of "all terms of sentence" was the belief that this is what Amendment 4 provides. This was not a pretext to hide racial motivation. Indeed, as it turns out, the view was correct. The Florida Supreme Court has told us so.

Second, while it is less clear that SB7066's treatment of judicial liens was based on an honest belief that this is what Amendment 4 requires, it is also less clear that this was an effort to favor Republicans over Democrats or that the only reason for believing this provision would have that effect was race.

Third, while the SB7066 registration form is indefensible, there is no reason to believe this was related to race. A more likely explanation is inattention or shoddy craftsmanship or perhaps lack of concern for felons of all races.

Fourth, there is no reason to believe the failure to provide resources was based on race. A more likely explanation is budgetary.

More importantly, there are other provisions in SB7066 that promote, rather than restrict, reenfranchisement. SB7066 provides that to be reenfranchised, a felon need not pay financial obligations that are not included in the four corners of the sentencing document or that accrue later. SB7066 allows courts to modify sentences to eliminate [felons' financial obligations] if specific conditions are met. And of less significance—it provides a remedy that, if not entirely illusory, will rarely matter—SB7066 authorizes courts to allow defendants to satisfy LFOs through community service. These provisions would not have made it into SB7066 if the only motivation had been to suppress votes or to favor Republicans over Democrats.

On balance, I find that SB7066 was not motivated by race.

A note is in order, too, about the limited effect of this finding.

A contrary finding for the SB7066 definition of "all terms of sentence" would make no difference, for two reasons. First, for this provision, the State would prevail on its same-decision defense; the Florida Supreme Court's decision now makes clear the State would read "all terms of sentence" to include financial obligations, with or without SB7066. Second, striking this part of SB7066 as racially discriminatory would make no difference—the Florida Supreme Court's decision would still be controlling. . . .

The bottom line: the plaintiffs have not shown that race was a motivating factor in the enactment of SB7066.

XII. Gender Discrimination

The McCoy plaintiffs assert the pay-to-vote requirement discriminates against women in violation of the Fourteenth Amendment's Equal Protection Clause and violates the Nineteenth Amendment, which provides that a citizen's right to vote "shall not be denied or abridged ... on account of sex."

To prevail under the Fourteenth Amendment, the plaintiffs must show intentional gender discrimination—that is, the plaintiffs must show that gender was a motivating factor in the adoption of the pay-to-vote system. This is the same standard that applies to race discrimination, as addressed above.

The plaintiffs assert the Nineteenth Amendment should be read more liberally, but the better view is that the standards are the same. . . .

On the facts, the plaintiffs' theory is that women with felony convictions, especially those who have served prison sentences, are less likely than men to obtain employment and, when employed at all, are likely to be paid substantially less than men. The problem is even worse for African American women. This pattern is not limited to felons; it is true in the economy at large.

As a result, a woman with [felony-based financial obligations] is less likely than a man with the same [obligations] to be able to pay them. This means the pay-to-vote requirement is more likely to render a given woman ineligible to vote than an identically situated man.

This does not, however, establish intentional discrimination. Instead, this is in effect, an assertion that the pay-to-vote requirement has a disparate impact on women. For gender discrimination, as for race discrimination, see supra Section IX, disparate impact is relevant to, but without more does not establish, intentional discrimination. Here there is nothing more—no direct or circumstantial evidence of gender bias, and no reason to believe gender had anything to do with the adoption of Amendment 4, the enactment of SB7066, or the State's implementation of this system.

> Moreover, the pay-to-vote requirement renders many more men than women ineligible to vote. This is so because men are disproportionately represented among felons. As a result, even though the impact on a given woman with [felony-based financial obligations] is likely to be greater than the impact on a given man with the same [obligations], the pay-to-vote requirement overall has a disparate impact on men, not women. Even if disparate impact was sufficient to establish a constitutional violation, the plaintiffs would not prevail on their gender claim.

Note: Applying the Intent Requirement

1. What do you think about these two courts' application of the *Arlington Heights* factors? Note how carefully the appellate court in *Mhany* 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. Despite the fact-intensiveness of the discriminatory intent inquiry, you should not assume that a district court's decision about discriminatory intent is absolutely immune from appellate correction. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court unanimously affirmed the appellate court's decision reversing the trial court's finding of no discriminatory intent. (Justice Powell did not participate.) *Hunter* dealt with a challenge to a provision of the Alabama Constitution, enacted in 1901, that disenfranchised persons convicted of certain crimes. Historical evidence made it clear that the provision's aim was to disenfranchise African-Americans, even though evidence existed suggesting that the delegates to the constitutional convention also intended to disenfranchise poor whites who were seen as potential populist allies of African-Americans. The Court wrote:

> The evidence of legislative intent available to the courts below consisted of the proceedings of the [1901 Alabama constitutional] convention, several historical studies, and the testimony of two expert historians. Having reviewed this evidence, we are persuaded that the Court of Appeals was correct in its assessment [finding discriminatory intent]. That court's opinion presents a thorough analysis of the evidence and demonstrates conclusively that [the provision] was enacted with the intent of disenfranchising blacks.

The Court thus concluded that the appellate court had correctly concluded that the district court had committed the "clear error" required to set aside the district court's fact-finding under the Federal Rule of Civil Procedure applicable to appellate review of trial court fact-findings (Rule 52(a)).

Is there something about the particular fact at issue in *Hunter* that perhaps made the Court more comfortable upholding the appellate court's reversal of the trial court's finding of no intent?

3. The *Mhany* opinion notes that, today, discrimination is usually not explicit—that is, there are relatively few situations where the government expressly classifies 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. This irony—that "discriminatory" intent is most easily found in cases of so-called "benign" or "affirmative action" cases—has not been lost on scholars, who cite it as a reason to critique the intent requirement more generally.

Similarly, the district court in *Jones* states that the issue was not "whether there was racial animus in any legislator's heart," but rather, whether the *Arlington Heights* factors revealed that race was a motivating factor in the legislature's decision. Leaving aside for the moment the appropriateness of the discriminatory intent requirement more generally, 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?

4. Consider, finally, 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? How did the *Jones* court deal with "the inference . . . that a motive [of the legislature] was to support Republicans over Democrats, coupled with the legislators' knowledge that SB7066 would have a disparate impact on African Americans, who vote for Democrats more often than for Republicans"?

Part V: General Fourteenth Amendment Issues

Chapter 18: The Problem of "State Action"

D. Cross-Cutting State Action Issues

***Insert at end of page 1106*:**

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?